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ABSTRACT

The purpose of this monograph is to acquaint journalism teachers, faculty advisers to student newspapers, administrators, and students with the court cases and decisions which have been made concerning student publications and underground newspapers. The chapters in the book include "Students' Rights: Background," which discusses the impact of the First Amendment on the student press and stresses the importance of free expression for high school students; "Students' Rights: Development," which examines the effect of the "Tinker" decision in establishing at what point student expression may be curtailed if school officials forecast a disruption of educational activities; "Students' Rights: Particular Circumstances," which presents cases exploring students' rights of expression on and off campus grounds; "Students' Rights: Administrative Regulations Allowed by Courts," which considers the powers of school administrators in dealing with student expression and cites several cases in which the courts upheld the administrators; and "Students' Rights: Additional Matters" which discusses cases concerned with the advertising and sales of student publications, the reinstatement of students following litigation, and the still undefined role of the publications adviser. (RB)

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Robert Trager

School of Journalism

Southern Illinois University at Carbondale

Student Press Rights

Struggles In Scholastic Journalism



Journalism Education Association



Clearinghouse on Reading and Communication Skills
1111 Kenyon Road, Urbana, Illinois 61801

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Contents

Foreword	ix
Preface	xi
Introduction	1
Students' Rights: Background	
Impact of the First Amendment	6
Free Expression for High School Students?	13
Students' Rights: Development	
The Landmark Case: <i>Tinker</i>	16
Extension of the "Interference" Rule	21
Students' Rights: Particular Circumstances	
Expressing Unpopular Opinions	25
Off School Grounds	28
Disruption by Others	30
Students' Rights: First Amendment Limitations	
Obscenity	33
Libel and Severe Criticism	36
Invasion of Privacy	39
Advocacy of Violence or Lawlessness	41
Students' Rights: Administrative Regulations Allowed by Courts	
Powers of School Administrators	43
Prior Restraint	44
Relative Immaturity of Secondary Students	50

Regulation of Distribution	52
Gross Disobedience or Disrespect	53
Other Administrative Means of Limiting Student Press Freedom	57
Students' Rights: Administrators' Responsibilities	
Vagueness and Overbreadth of Rules	59
Due Process	63
Students' Rights: Additional Matters	
Advertising and Sales	65
Litigation	68
Adviser's Role	71
Conclusion	74
Bibliography	76
List of Cases	79
Explanations of Legal Citations	83

Foreword

The National Institute of Education (NIE), recognizing the gap between educational research and classroom teaching, has charged ERIC (Educational Resources Information Center) to go beyond its initial function of gathering, evaluating, indexing, and disseminating information to a significant new service: information transformation and synthesis.

The ERIC system has already made available—through the ERIC Document Reproduction Service—much informative data, including all federally funded research reports since 1956. However, if the findings of specific educational research are to be intelligible to teachers and applicable to teaching, considerable bodies of data must be re-evaluated, focused, translated, and molded into an essentially different context. Rather than resting at the point of making research reports readily accessible, NIE has now directed the separate ERIC Clearinghouses to commission from recognized authorities information analysis papers in specific areas.

Each of these documents focuses on a concrete educational need. The paper attempts a comprehensive treatment and qualitative assessment of the published and unpublished material trends, teaching materials, the judgments of recognized experts in the field, reports and findings from various national committees and commissions. In his analysis he tries to answer the question, "Where are we?"; sometimes finds order in apparently disparate approaches; often points in new directions. The knowledge contained in an information analysis paper is a necessary foundation for reviewing existing curricula, planning new beginnings, and aiding the teacher in *now* situations.

The purpose of this monograph is to acquaint journalism teachers, faculty advisers to student newspapers, administrators, and students with the court cases and decisions which have been made concerning student publications and underground newspapers. The author, avoiding giving legal advice, discusses the implications of the court de-

x Foreword

cisions with respect to the rights of students and the responsibilities of teachers and administrators.

Bernard O'Donnell
Director, ERIC/RCS

Preface

At the same time that our nation nears its bi-centennial celebration and a re-dedication to the principles upon which the country was founded, scholastic journalism is finding new strength in fighting for First Amendment freedoms for students and teachers alike at the secondary level.

Recently, the Commission of Inquiry into High School Journalism, sponsored by the Robert F. Kennedy Memorial, made public the results of its one-and-a-half-year study of high school journalism. Its report, appropriately titled *Captive Voices*, disclosed a wide subversion of democratic principles in the secondary schools of this country. Not only was there heavy censorship of the school press despite many court rulings to the contrary, but other tactics, such as the hiring of journalism teachers with little or no training in journalism and heavy overloads for the teachers, were revealed.

Another recent development has been the refusal of some school systems to grant tenure to journalism teachers. In these cases, if the journalism teacher is retained, he is transferred to English, the social sciences, or another academic area for which he may be ill-prepared.

In recognition of this desire to stem the freedom of expression and to prohibit "rocking the boat" by some school systems, the Journalism Education Association has taken action in several areas to assist communications teachers who want to exercise their rights and responsibilities as teachers. Important dialogue has been opened at our national conventions, in our professional quarterly magazine, *Communication: Journalism Education Today*, and at regional conferences. The California Commission on Freedom of the High School Press was the result of discussion at our 1974 San Francisco convention.

The recent establishment of the Scholastic Press Freedom Fund by JEA resulted in the first small grant of funds to assist a young Indiana teacher in filing a court case to retain her job. She had been fired by the school board because her students prepared a fine five-part series on student sex-related problems.

To provide immediate assistance and counseling, JEA established a HOTLINE phone and mail service for teachers who were faced with problems with their administration or of a more technical nature.

A long-term attempt to educate school administrators on the law and the reasons for it has been started.

It is because of this background of turmoil and uncertainty on the legal aspects of scholastic journalism that this book is important not only to communications teachers, but to administrators, educators, and the public. The law does change as the result of new decisions in court cases. Therefore, it is not enough to just know "Is it right or wrong?" The law is rarely that black and white.

This book gives every reader the opportunity not only to become aware of the current legal decisions, but, more importantly, to find out the "why" of the decisions and the restrictions which must be considered.

The Journalism Education Association is happy to cooperate with ERIC and Robert Trager in our Golden Anniversary year to help more educators improve their expertise in a very difficult and changing field.

T. Jan Wiseman
President, JEA

Introduction

The popular motion picture "American Graffiti" and recent television programs echoing similar themes serve as reminders that high school students were once quite different than they are today. Prior to adolescents' deep involvement with the media, protests, and ethnic consciousness, and before their awareness that they too have constitutional rights, secondary school students were a relatively quiet group. But the 1950s have surely passed. During the 1960s, many high school students became aware of and involved in issues of public concern, including some events far from the high school campus. They refused to submit quiescently to what they considered unreasonable demands of parents and, particularly, school officials and teachers. Due in great part to the mass media and interchanges of information among themselves, adolescents were more knowledgeable about current affairs than were their earlier counterparts. This knowledge may have convinced them that information they received from teachers and administrators was incorrect, incomplete, or distorted. More importantly, their broadened views of the world became an element in what some adults saw as disrespect for authority, but which many high school students contended was a means of ascertaining that all their legal rights were granted to them.

As more students became concerned with public issues and increasingly articulate about such matters, they desired to convey their feelings to their peers. While lunchroom and out-of-school conversations were valuable to this end, high school students were sufficiently media-wise to realize that putting their thoughts on paper, duplicating them, and distributing them was a far more efficient and effective method.

Thus, "underground" newspapers were born, both off campus [24; 11] and on the school grounds. The term "underground newspapers" refers to periodicals "written and published by students at their own expense and off school premises," and not officially sanctioned by

2 Student Press Rights

school authorities [33:144, 152; 47]. Some school administrators were appalled by these publications and attempted to stop their distribution, usually by suspending the students who had written and were circulating them. At the same time, other students began to pull the school-sponsored paper away from the bulletin-board era of discussing only on-campus issues, and then only in a positive light, toward making them newspapers concerned with matters of broad public interest. Administrators again balked.

It was inevitable then, that "claims of First Amendment protection on the one hand and the interests of school boards in maintaining an atmosphere in the public schools conducive to learning on the other" [Sullivan II at 1072] would clash and the courts, which had traditionally left hands-off most school officials' decisions, would be forced to rule on the difficult question of secondary school students' freedom of expression. The result "has been a shift from a judicial attitude which vested virtually absolute control in school authorities to one concerned with the rights of students as citizens" [33:145].

However, the concept of students' rights has not yet been clearly defined. In the mid-1970s, it is still a growing and complex area of law, one fostering disagreement and varying interpretations. It is not possible, therefore, to easily specify what rights students do and do not have; rather, it is necessary to define these rights by discussing differing court opinions and observations of legal authorities. In some instances, it is necessary to read a judge's exact words to determine what he finds permissible and where he draws the line. The conflicts among a judicial tradition allowing autonomy to school officials, recent court decisions granting students more freedom of expression, and the need of school officials to maintain the educational process have not allowed for widespread agreement among the courts, administrators, and students as to the degree of press freedom on high school campuses.

Additionally, one must interpret courts' opinions narrowly so that students and others interested in students' rights do not overstep the presently permissible bounds. Reading more into a decision than the judge intended may mean assuming an extension of free expression that is beyond these bounds. Similarly, predicting what a court might rule in a hypothetical situation is folly. Students' freedom of press is not yet sufficiently defined to allow attempts to outguess the judiciary. It is safest to review the decisions that have been made, consider them in the context of the facts in each case, and derive some generalizations.

Because interpretation is needed, discussion and conclusions in this study will be drawn in great part from a review of federal and state cases involving secondary students' publications and from commentaries in legal journals on that subject. Philosophical and theoretical

approaches to students' freedoms will also be based on observations by judges, lawyers, and legal scholars.

The philosophical approach is important. Administrators have ignored or acted in ignorance of court decisions in repressing student expression. Consequently, the legal base is not sufficient. It is also necessary to know why courts have made certain decisions and in what ways their approach has changed over the years. *Why* students should have freedom of expression is perhaps as important as the fact that, increasingly, they do have it.

Only secondary school students are in question here, that is, those above the grade school level but not yet in college. While many cases involving freedom of expression on the college campuses have been decided by the courts [*Papish*; see also 1], few of these rulings can be considered applicable to the secondary level, primarily because adolescents are thought to be less mature than older students. Occasionally a college case will be cited if it makes a point appropriate for high schools.

Additionally, this study is limited to high school *students* and does not include the distribution of materials by non-students on school grounds, a matter involving additional considerations [39]. While a federal Court of Appeals has stated that there is no doubt that a school board rule prohibiting distribution of literature not written by someone connected with the school (except for advertising in student publications) abridges First Amendment rights [*Jacobs*¹], the legal tangle of this is beyond the scope of this study.²

¹ Shortly before this book went to press, the Supreme Court granted *certiorari* in *Jacobs v. Board of School Commissioners*. The Court's decision in the case is expected during the October 1974-June 1975 session.

² The Supreme Court has allowed peaceful picketing in areas directly connected to a school by persons not necessarily affiliated with the school. In *Police Department of the City of Chicago v. Mosley*, the Court ruled unconstitutional an ordinance forbidding peaceful picketing within 150 feet of a school, except peaceful labor picketing, on the grounds that the ordinance made a distinction on the basis of *content* between labor issues and non-labor issues. In *Grayned v. City of Rockford*, the Court ruled similarly but also upheld an ordinance prohibiting noise which disturbs the "good order" of the school while it is in session.

In a third case, *State v. Oyen*, the Supreme Court considered a situation involving non-students who distributed anti-draft leaflets around school buildings and were arrested and convicted on vagrancy charges. In part, the Washington Supreme Court had upheld the conviction on the grounds that, while school grounds are "public" property, persons not connected with the school "are subject to reasonable statutory, as well as administrative, regulation and proscription." The state court noted that an otherwise valid law is not invalidated simply because it interferes with First Amendment rights while "protecting important societal interests" [at 772]. However, the Supreme Court of the United States vacated the ruling and ordered that the case be reconsidered in light of the *Police Department* and *Grayned* decisions.

4 Student Press Rights

This discussion will include both school-sponsored publications and those considered "underground" newspapers. Both types enjoy the same protections under the law; freedoms enjoyed by the former are, in essence, understood to belong to the latter [see 46; 47]. Most court cases involving high school students' freedom of written expression are concerned with underground papers and are generally precipitated by the suspension or expulsion of students distributing the papers. These rulings are applicable to school-sponsored publications as well, although administrators may have certain powers over these that differentiate them from publications not formally tied to the school. For instance, administrators may be able to remove the school-sponsored newspaper's subsidy, although not during the school year and not for First Amendment-related reasons [Antonelli; Joyner], or they may be able to deny the paper adequate facilities. It has been suggested that restrictions on school-sponsored publications tend to encourage students to put their writings into non-school-sponsored papers where they are less likely to succumb to administrative pressures, since courts have given increasing freedom to underground papers.

In general, then, this study will attempt to show that freedom of the press is established by the First Amendment and made binding on the states through the Fourteenth Amendment; that school officials, as arms of the state, must uphold the freedoms guaranteed by the First Amendment; that students are, therefore, granted freedom of the press. However, the First Amendment is not absolute, and school officials are empowered to make reasonable rules to enforce decorum on campus [see 46]. The courts have recently significantly narrowed this area of administrative power so that the bounds of student freedom are less gray than they previously have been.

To appreciate the degree of impact of the various court decisions to be reviewed in this study, it is helpful to understand the American judicial structure. Most students' rights cases are decided in the federal, rather than state, courts. The federal trial courts, those where a case is first heard, are called District Courts. There are ninety-three federal District Courts, at least one in each state. Cases in these courts are frequently decided by a judge who hears the evidence, rather than by a jury.

When either party in a civil suit (as opposed to criminal cases involving violations of specific laws) is dissatisfied with a District Court's decision, the case can be appealed to the appropriate Circuit Court of Appeals. There are ten Circuits, nine of them having a group of states as their jurisdictions. For instance, the First Circuit includes Maine, New Hampshire, Massachusetts, and Rhode Island, and it hears cases on appeal from District Courts in those states. The remaining Circuit Court of Appeals is for the District of Columbia.

The Supreme Court of the United States, comprised of nine members including a Chief Justice, is the final appeals court in the country. Most cases reaching the Supreme Court are appealed on *certiorari*, under which method the Court may grant or refuse review as it chooses. Refusal means that the Court of Appeals' decision stands.

All decisions made by the Supreme Court are binding on all other courts in the country, both state and federal. Decisions made by a Circuit Court of Appeals are binding only on the District Courts within its jurisdiction. This means that in deciding cases which present facts essentially similar to a case previously ruled on by the Court of Appeals, the District Courts within that Circuit must follow the higher court's decision. But the Third Circuit Court of Appeals is under no obligation to be consistent with the rulings of the First, Second, Fourth, or any other Circuit Court. Nor must one District Court rule as any other District Court has ruled; it must be consistent only with its Court of Appeals and the Supreme Court.

As if that were not a sufficient problem in allowing persons to determine the proper interpretation of a law or the Constitution, one judge may say the facts in a case are essentially similar to, say, a Supreme Court ruling, but another judge may disagree. Therefore, there is disagreement as to whether the higher court's ruling is binding. But within these boundaries of interpretation, the object is that similar cases will be decided in the same way. This *must* be done in following Supreme Court decisions or Courts of Appeals decisions within a Circuit. However, it *may* be done in other situations. That is, a case may be considered *persuasive* even though a particular court is not bound to follow it.

Cases involving regulations which allow school districts to determine the length of male students' hair serve as an example of the confusion that can arise. As many Courts of Appeals have upheld such regulations as constitutional as have struck them down. Thus, the law for a student in Indiana is different than for one in Ohio, because the Seventh Circuit has ruled against hair length regulations while the Sixth Circuit has upheld them.

The situation concerning secondary school students' freedom of expression is not quite so confused, but neither is it entirely clear. The Supreme Court has ruled on a case involving the wearing of arm bands by students to protest the Vietnam War [*Tinker*], but that decision has been interpreted in different ways by different courts when attempting to apply the general principles of the case to many other areas of students' rights, including freedom of printed expression. The court has accepted for review a case involving high school student publications. The decision in that case [*Jacobs*], due in the 1974-75 Court term, may help answer certain questions involving the secondary school press.

Students' Rights: Background

Impact of the First Amendment

The First Amendment guarantees freedom of expression, even for "the thought we hate," and includes writing, printing, distributing, and receiving information, but allows punishment for libel, obscenity, and words inciting to violence. States and, thus, public school officials must also guarantee this freedom. Courts once allowed school officials considerable autonomy over students, but now consider high school students' freedoms to be of major concern.

Press freedom is one of the guarantees of the First Amendment to the Constitution: "Congress shall make no law . . . abridging the freedom of speech, or the press. . . ." This is now construed by courts to proscribe abridgment of most forms of expression, since speech and press have come to be "identical" and "cognate rights" [18:1] including such forms of "symbolic" or "pure" speech as the wearing of arm bands [*Tinker*]. Government officials are forbidden to censor or interfere with expression unless the circumstances are exceptional [*New York Times Co. II*; *Bantam Books*; *Near*].

As a limitation on governmental power, freedom of the press is not confined to ideas which comply with present government policy or ideas with which a majority of the population agree [*Kingsley* at 689, 705]. Justice Holmes wrote, "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought we hate" [*United States II* at 654-655]. The American system of government must not allow suppression or censorship of expression even though it is hateful or offensive to those in power or strongly opposed by the public [*Cox*]. Provided the expression is not libelous [*New York Times Co. I*; *Gertz*] or obscene [*Miller*] or does not incite violence and lawlessness [*Chaplinsky*; *Brandenburg*], there is a national commitment to the idea that public issues may be debated, and those debates may include sharp, sometimes unpleasant attacks on ideas, opinions, and public officials

[*New York Times Co. v. Sullivan*; *Terminiello v. Chicago*; *De Jonge v. Oregon*]. Nor may advocacy of illegal conduct be denied if it "falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on" [*Whitney v. California* at 376].

This First Amendment freedom "must be so actual and certain that fear and doubt are absent from an individual's mind" [*N.L.R.B. v. American Federation of Labor* at 500], thus insuring that indirect curtailment of free press is practiced no more than direct limitation [*Williamson v. United States* at 1382-1383]. Freedom of the press has also been extended to distributing, writing, and printing [*Talley v. California*; *Tucker v. California*; *Lovell v. Board of Education*; but limited in *Breard v. Alexandria*] as well as to the right to receive and the right to read [*Lamont v. Post Office*; *Martin v. City of Struthers*; *Brooks v. Board of Education*].

In the face of that, however, very few legal scholars have held the First Amendment to be absolute. The most notable advocate of the absolutist policy was Justice Hugo Black, who has stated, "It is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant and meant their prohibitions to be 'absolutes.'" [The First Amendment] says 'no law,' and that is what I believe it means" [27:548]. For most jurists, however, freedom of expression as protected by the First and Fourteenth Amendments is subject to certain restrictions to protect society's interests in government, order, and morality. This is exemplified by Justice Holmes' observation that "the character of every act depends upon the circumstances in which it is done. . . . The most stringent protestation of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic" [*Schenck v. United States* at 52].

Ultimately, then, the First Amendment right to free press protects writing, printing, and distributing, punishing only libelous and obscene publications and those which clearly instigate unlawful action, and prohibits the government from imposing prior censorship except in "exceptional cases" [*Near v. Minnesota* at 716]. At most, the courts have held no more than that those who enjoy this freedom are answerable for any abuse thereof.

While the First Amendment bars only congressional abridgment of free expression, the Supreme Court, in a series of decisions beginning with *Gitlow v. New York*, has held that the Fourteenth Amendment clearly protects a citizen's First Amendment guarantees of freedom of speech and press against infringement by state officials. Thus, while freedom of expression for students is based in the First Amendment, the doctrine is made mandatory for the states through the Fourteenth Amendment, section 1, clause 2: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court

has stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone" [Gault at 13].

One more extension must be made to bring public secondary school students under the protection of the First Amendment. The Fourteenth Amendment "is limited, both by its literal terms and a century of cases, to action by the state. . . . It has long been settled, however, that state action may take many forms, including action by officials under color of law, and by agencies of the state—such as school boards—performing official functions" [12:1056]. School boards, superintendents, principals, and teachers for public high schools, then, are arms of the state, empowered by legislative action to perform their duties as instructed, those instructions usually being in very broad terms. Within the confines of federal and state constitutions, the absolute power of legislatures over educational systems is unrestricted.

Public high school boards are public agencies operating under a legislative delegation of authority permitted by the state constitution, which contains a provision for public education. The board may be viewed as an instrument of state education policy, in which case it clearly is an arm of the state, or as a local governmental unit, thus coming within a tradition which provides that such units are agencies of the state government [20:384-387; Westley; Hinton]. In either case, it is acting under the color of state law. Justice Fortas uses the phrase, "the State in the person of school officials," in the landmark case of *Tinker v. Des Moines Independent School District* [at 509]. The Supreme Court has repeatedly viewed public school districts as agencies of the state [Epperson; Engel; West Virginia] and has emphasized that they are not immune from First Amendment limitations [West Virginia]. State and lower federal courts have also stressed this position [Burnside; Blackwell; Crews; Clark].

Superintendents, principals, and teachers are considered to be under the control of school boards and, thus, the state [Ruff; Russell; Zeller]. Although the community may apply pressure to public school officials and teachers, ultimately they are not legally responsible to the community, but rather to the school board [Heath]. Consequently, such school officials, as well as members of boards of education, are subject to the limitations established by the First Amendment.

It is important to note that the discussion of how the First Amendment applies to school officials through the Fourteenth Amendment involves public schools only. Although many observers contend that all schools are to a greater or lesser degree "public" institutions [50: 1035; Cohen], private schools are *not* considered extensions of the state, their officials are not arms of the state, and only "state action," not "private action," is covered by the Fourteenth Amendment [e.g., see Blackburn; 21; 40]. Generally, courts view a private school's rela-

tionship with its students in terms of contract law, and "only if the school has violated the terms of its agreement, usually defined by its own rules and regulations, may an aggrieved student . . . obtain judicial relief" [12:1054-1056].

For example, two students expelled from a parochial school for twice violating a rule they clearly understood could bring such punishment (leaving school grounds during the school day) sued for readmission claiming a loss of property rights, that is, their tuition payments, without due process of law. The Court of Appeals upheld the District Court's decision that the Fourteenth Amendment does not apply to private schools, even though the state provides indirect financial help to the institution [*Bright*]. One authority has persuasively argued that private colleges and universities have sufficient state involvement through federal and state loans, scholarships, research grants, and tax considerations that they should clearly be brought under the Fourteenth Amendment [49]. Additionally, the Supreme Court has applied a "state action" doctrine to private institutions when racial discrimination has been involved [*Burton; Evans*], but "the courts have seemingly been reluctant to extend the doctrine to eliminate other kinds of activities that would be deemed unconstitutional if performed solely by the state" [42:503; see *Grossner; Powe*].

Although the courts currently do not guarantee the First Amendment rights of private school students through application of the Fourteenth Amendment, Dan L. Johnston, one of the lawyers who handled the *Tinker* case, thinks judges should take a different perspective on the issue:

I believe the concern of the courts is for an educational system that makes a substantial contribution to the development of free men and democratic citizens, which is as important for private education as it is for public education. If private education wants support from the public sector, which I am aware it does, then it is going to have to convince me, as a citizen, that it is making that kind of contribution; but if it is simply educating people in a totalitarian environment to become subjects of a totalitarian state, then it is not deserving of any public support. [43:1062]

Courts have not always been anxious to intrude into the workings of public schools, either, for many years accepting the power of administrators. In fact, the concept of students' freedom to learn has been almost nonexistent on the secondary level. High school students have been put in this position partly because of their lower levels of maturity and sophistication as compared with adults, and partly because high school is conceived as being the time for "transmission of existing knowledge, traditions, and values," as opposed to a university's task of honing and increasing that knowledge [34]. Conse-

10 Student Press Rights

quently, school officials have traditionally sought to exert considerable state power over secondary students, including "attempts to insulate public high school students from controversial ideas while in the classroom or on school premises" [34:1033]. While an increasing number of students in recent years have objected to this and attempted to use the courts as a recourse [21:212-213], judges have actually been confronted with school-related cases since the late 1800s.

Earlier courts allowed, perhaps encouraged, dogmatic administrators [29:223], as evidenced by such comments as, "The school committee [is] in a situation to judge, better than any tribunal, what effect such misconduct has upon the usefulness of the school . . . [and] their decision is not subject to revision by the court. . . . [Their] action is conclusive" [*Hodgkiss* at 476]. But in the same year that a school board action in expelling a seventeen-year-old girl for wearing face powder was upheld by a state court [*Pugsley*], the Supreme Court, reticent to grant extended power to states, struck down a state law prohibiting the teaching of foreign languages to elementary students [*Meyer*].

From the 1930s until very recently, however, intense judicial scrutiny of school officials changed to an acceptance of administrative decision making. A striking exception to this was a Supreme Court decision allowing school children to refuse to salute the flag. The Court said, "Students explicitly possess ordinary constitutional rights. . . . The Fourteenth Amendment as now applied to the States, protects the citizen against Board(s) of Education. . . . These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights" [*West Virginia* at 637]. Generally during this time, though, courts would uphold school regulations on the grounds that they were not "clearly arbitrary and unreasonable" [*Board of Directors* at 858], although "courts never explored whether or not the rules performed a proper educational function" [19:613]. One observer noted that court decisions "reflected educational theories in which the public school was viewed as a place separate and apart from the rest of the world—including, in some cases, the student's family" [35:1480]. Clearly, the courts were allowing school officials to determine the social and educational worth of the student's entire day and to emphasize strict order and discipline [35:1480].

There have been several reasons suggested for allowing such wide-ranging control over students by public schools. One is that the Tenth Amendment's reservation to the state of powers not specifically given to the federal government leaves education "entirely without the protective perimeters of the rest of the Constitution" [*Shanley* at 967]. A Court of Appeals has characterized this argument, when presented by

a school board, as "a constitutional fossil, exhumed and respired to stalk the First Amendment once again long after its substance had been laid to rest" [Shanley, citing *West Virginia* and *Tinker*]. Also presented is the theory that schools stand *in loco parentis* (in place of a parent) [Gott at 206] or as *parens patriae* (sovereign power) [Wisconsin *Industrial* at 428] in relation to students. But when school administrators and teachers take over the parents' role, are they always acting as the child's parents would want? In fact, whenever a minor child sues a school official, district, or board claiming a violation of his rights, the suit must be filed by a parent or guardian, presumably with the latter agreeing with the child's claim. Aside from this at least tacit approval, the testimony in many such cases has shown that the parents actively agreed with the child's stance, even encouraged it. The most notable example is the *Tinker* case, where the children wore arm bands with their parents' consent. In attempting to prohibit such action the school, in fact, was "countermanding the strong religious and political views of the [children's] parents" [25:1026]. Courts have dismissed the concept of *in loco parentis* with such phrases as "... [it] has no applicability" [Breen at 1038], and "... the doctrine is of little use in dealing with our modern 'student rights' problems" [Zanders at 756]. In the past, courts have also viewed education as a privilege granted at the school's discretion and as a contract under which students waived their rights by attending the institution [7:614]. Few judges view these contentions favorably today as applied to public schools.³

One authority sees this current era of judicial involvement with the schools in the area of student rights as due to three factors: (1) a lack of certainty as to the efficacy of administrative expertise and the administrative process generally, (2) increasing doubts that public education is fulfilling its function of educating children, (3) the court's awareness, particularly in racial questions, that schools do not treat all children equitably [19:613-614].

However, as this judicial concern with education has grown, so also has the concern among jurists as to the courts' correct role. "That courts should not interfere with the day-to-day operations of schools is ... [an] eminently sound maxim ...," suggested one judge [Shanley at 967; see also *Burnside*; *Blackwell*; *Karr*]. The Supreme Court has strongly emphasized that "judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint" [Epperson at 104]. Other courts have noted that school officials must have "a wide latitude of discretion, subject only to the restriction of reasonableness." Also, "[t]hat which so interferes

³ For support of a "modified" *in loco parentis*, see Haskell, "Judicial Review of School Discipline," at 242-245.

12 Student Press Rights

with or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed . . . even when that which is condemned is the exercise of a constitutionally protected right" [Ferrell].

Justice Black, during oral arguments before the Supreme Court, in the *Tinker* case, asked where the right of free speech for school children begins—with five year olds, in kindergarten [25:1025]? Paul G. Haskell, a law school professor, questions the wisdom of courts using the power of invalidating on constitutional grounds the decisions of "those experienced in the field of public school administration who have been entrusted by the local community with the responsibility for making [such decisions]" [21:241].

Courts certainly are overturning school officials' decisions more often now than in the past. While doing so, they seem to be recognizing that education is no longer a matter of pouring knowledge into the students' heads. The process is now an active, involving one, and students wish to be co-participants with their teachers. As noted previously, high school students today are more aware of their world and more mature than their counterparts (or even college students) a generation ago, and they will not be content with the more traditional forms of education. Additionally, judges are disinclined to accept lengthy suspensions or expulsions because of the importance of education in today's world and the consequent harm done to students by such punishments. Finally, courts are increasingly ruling that an individual's personal and constitutional rights should not be interfered with by schools (or, more broadly, by the state) [19:614-616].

Having applied the First Amendment to the states (and, thus, public schools), courts have since struggled to balance students' rights with the duties and responsibilities of administrators. This is exemplified by one judge's observation:

Free expression is itself a vital part of the education process. But in measuring the appropriateness and reasonableness of school regulations against the constitutional protections of the First and Fourteenth Amendments the courts must give full credence to the role and purposes of the schools and of the tools with which it is expected that they deal with their problems, and careful recognition to the differences between what are reasonable restraints in the classroom and what are reasonable restraints on the street corner. [Ferrell at 704-705]

It is in this balancing of rights that the scales now seem tipped toward students' freedom of expression.

Free Expression for High School Students?

- " *While participating in an educational process and learning to function as citizens in a democracy, high school students should be able to disseminate and receive stimulating, perhaps controversial ideas while exercising their First Amendment rights.*

Some high school students, aware of their First Amendment rights, will approach administrators with the attitude, "I'm going to distribute these papers whether you like it or not. I know it's my right to do so." And administrators will reply, "Not on this campus. And if you don't like it, take me to court." While the students, if their newspapers do not disrupt the educational process, might win such a court battle, little may be gained. Forced recognition of students' rights is given grudgingly at best, and the impasse is not resolved. At least one court has issued a strong plea to students and school officials not to throw down the gauntlet, but to attempt compromise through discussion, to see, perhaps, the practical as well as the legal side of the question [*Bazaar* at 581].

The "generation gap" between some students and administrators, which makes compromise difficult, is in part due to the differences in the worlds in which each grew up. Today's high school students live in an ever-changing environment where knowledge increases and alters so rapidly that no individual can keep pace. Adolescents know that what they learn in class today may be obsolete tomorrow and that even the societal institutions, the values of which they are encouraged to accept, are in varying states of disarray and change. Even basic concepts may not be long lasting. An education, then, is no longer a matter of filling the "tabula rasa" of young minds with the world's truths; it is now a participatory process involving both educator and educated [3:173]. The students are an integral part of the process, learning from their teachers, but also learning on their own and from each other.

Part of this learning process is developing the ability to deal with ideas—to express, question, listen to, and disseminate them. Ideas and opinions should be spread, not stifled—dispersed by students as well as their elders. "Ideas [given to] . . . school children must be freed from despotic dispensation by all men, be they robed as academicians or judges or citizen members of a board of education" [*Shanley* at

14 Student Press Rights

973]. The Supreme Court has held that public school students must be given the "widest latitude for free expression and debate consonant with the maintenance of order" [*Healy* at 194; see *Koppell* at 459], while at the same time being challenged to responsibly utilize this freedom [3:173; *Tinker* at 503].

It is controversial issues for which this freedom is intended. Robert Maynard Hutchins, director of the Center for the Study of Democratic Institutions, has written, "It is on precisely those issues which stir up emotion and controversy and in precisely those parts of the country where they are most emotional and controversial, that rational discussion is most needed" [23:8]. Student publications should be forums for discussion and debate of these issues [see *Zucker*].

One reason for this is that secondary school students are increasingly participating in the democratic process as citizens. The Twenty-sixth Amendment granting voting rights to eighteen year olds and legislation in several states reducing the age of majority from twenty-one to eighteen years reflect a societal understanding that people function as adults at an earlier age [48:1036]. It is during the high school years that students learn much about the democratic process and its institutions. They become increasingly disillusioned about political processes and inclined to disengage from political participation, and because of this "it is most important that our young become convinced that our Constitution is a living reality, not parchment preserved under glass" [*Shanley* at 972-973]. Learning the First Amendment and its interpretations in class while facing arbitrary censorship of their publications can only make students increasingly cynical about authority, institutions, and democracy. The Supreme Court has emphasized that "educating the young for citizenship is reason for scrupulous protection of the Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes" [*West Virginia* at 637]. The concept of absolute authority over students by school officials is antithetical to the constitutional system. No matter how well intentioned, broad invasion of students' rights "shudders the conscience of those to whom the First Amendment is sacred" [*Shanley* at 977; see also *Eisner* at 809-810; 39:1333].

While the rights of those writing and distributing student publications are at issue when arbitrary censorship is imposed by school officials, the Supreme Court has emphasized that the First Amendment also applies to *receivers* of information [3:174-175]. Most recently, in *Lamont v. Postmaster General*, the Court held violative of the First Amendment a federal statute requiring foreign mailings of "communist political propaganda" to be delivered only upon a specific

request from the addressee. In a concurring opinion, Justices Brennan and Goldberg saw the right to receive information as an essential ingredient of the First Amendment: "[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise unwilling [receivers] are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers" [at 308]. And writing of Justice Black's views, Edmund Cahn notes:

What higher public interest is there than enlightenment of the electors, and what higher social interest than the intellectual advancement of the community? Not alone the speaker . . . writer or printer, has a stake in the First Amendment: the whole conglomerate mass of the community audience is involved. Including those who are almost sure they will never wish to speak and those who are completely sure they do not wish to listen . . . [N]o one is required to listen, but even a unanimous unwillingness to listen does not justify repression. . . . [at 480]

Students' Rights: Development

The Landmark Case: *Tinker*

In Tinker v. Des Moines Independent School District, the Supreme Court stressed that school officials cannot inhibit students' freedom of expression except when such expression "materially and substantially" interferes with educational processes, and not merely because of a desire to avoid the unpleasantness that may accompany unpopular expressions.

In *Tinker v. Des Moines Independent School District*, the Supreme Court emphasized that an unwillingness to listen could not justify censorship of student expression. *Tinker*, the touchstone for most students' rights cases, was presaged by *Burnside v. Byars*, which invalidated a regulation prohibiting the wearing of "freedom buttons" by black students in a Southern high school. School officials were unable to prove disruption resulted because of the students' actions, and the *Burnside* court laid down the rule, later cited with approval in *Tinker*, that is the standard against which student actions are measured:

[School administrators] cannot infringe their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights . . . [does] not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. [*Burnside* at 749]

It is significant that in a second case decided by the same Court of Appeals on the same day school officials were upheld in suspending students wearing "freedom buttons," because they attempted to force buttons on other students and created what administrators described, and the court accepted, as material and substantial disruption [*Blackwell*].

It is in *Tinker* that the Supreme Court declared: "School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution.

They are possessed of fundamental rights which the State must respect . . ." [at 511]. This case, which has been cited in over 350 court decisions since it was announced, emphasized that "the process of education in a democracy must be democratic" [38:159]. The Court created a new balance between students' freedoms and school administrators' needs for decorum on campus, dealing "broadly and directly with the extent to which students may affirmatively determine or control their own learning experience" [35:1481].

The case involved two high school students and one junior high school student who wore black arm bands to campus to protest American involvement in the Vietnam War. Hearing that such actions were planned, principals of the Des Moines schools adopted a policy that any student wearing an arm band would be asked to remove it and any who refused would be sent home. The students involved in this case knew of the regulation, violated it, were suspended and did not return to school until the end of the planned period for wearing arm bands. A complaint was filed with federal District Court asking that school officials be restrained from disciplining the children for such actions, and the case was finally decided by the Supreme Court. Generally, the Court held that to justify the curtailment of student expression, administrators must show their actions are due to more than "a mere desire to avoid the discomfort and unpleasantness" [*Tinker* at 509] that accompany expressions of minority viewpoints, and that administrators cannot abridge students' rights of free expression "where the exercise of such rights . . . [does] not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" [*Tinker* quoting *Burnside* at 749].

The significant passages from the *Tinker* decision are these:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit [in *Burnside*] said, school officials cannot suppress "expression of feelings with which they do not wish to contend. . . ."

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than mere desire to avoid the dis-

comfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct could "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," prohibition cannot be sustained. . . .

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school. It is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so "without materially and substantially interfer[ing] with appropriate discipline in the operation of the school" and without colliding with the rights of others. . . . But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guaranty of freedom of speech [*Tinker* at 509-513].

Despite distractions, then, if they are short of disruptions, students may express their opinions, at least political ones, even if they are unpopular viewpoints. Fellow students may not interfere with the expression any more than may administrators [35:1482]. Although one observer holds that *Tinker's* principles may not be applied to student expression "substantively different from the political symbolism" involved in the case [22:40], and the Court specifically noted the case did not deal with regulating "the length of skirts or the type of clothing, . . . hair style, or deportment" [*Tinker* at 507-508], the decision clearly diminishes administrators' authority to curtail student expression on school grounds [48].

Additionally, *Tinker* shifts the burden of proof from students—to prove they did not disrupt school—to administrators—to prove disruption did result (or would have resulted, as is discussed below). "Since it is the school board that asserts the right to curtail presumptively protected activity, the board should bear the burden of establishing why; and . . . the school board presumably has the essential information that led it to conclude that the activity had to be curtailed" [*Shanley* at 969]. A lawyer acting for the children in *Tinker* notes that he hoped for such a result. He reasoned that if it could be shown that the students engaged in conduct for the purpose of expressing a political point of view and had been suspended for such conduct, it would be up to the school to prove that the reasons for suspension "overrode the students' right of free speech" [25:1025]. In dissenting from the Court's opinion, however, Justice Harlan proposed turning

the rule around and putting the burden on students to show that a "particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion" [*Tinker* at 526]. It is significant that this view was not adopted by the majority and later cases in the lower courts have put the burden of proof on the schools [*Sullivan I*; *Scoville*].

Of importance is the fact that *Tinker* dealt with what the Court viewed as "akin to pure speech"—the wearing of arm bands. The students did not advocate action or engage in action other than a passive expression of views. First Amendment scholar Thomas I. Emerson writes, "The essence of a system of freedom of expression lies in the distinction between expression and action. The whole theory rests upon the general proposition that expression must be free and unrestrained . . . and that the attainment of [social] objectives [by the state] can and must be secured through regulation of action [and not by regulation of expression]" [15:115]. Does *Tinker*, then, apply to more than just arm bands? Does it apply to student newspapers, to printed expressions of students' views? Apparently, yes [*Eisner*; *Scoville*; *Sullivan I*; *Quarterman*]. Most courts dealing with student publications attempt to apply the *Tinker* guidelines, and one authority holds, "If a student is doing no more than distributing copies of [a student paper], the contents of which are neither libelous nor obscene, he should rarely run afoul of the *Tinker* guidelines" [2:997].

In all situations, however, the *Tinker* "freedoms" apply only if school authorities cannot show or forecast "substantial disruption of or material interference with school activities" [*Tinker* at 514] and if the expression does not intrude "upon the work of the schools or the rights of other students" [*Tinker* at 508]. Several cases have forced courts to interpret those phrases in light of student freedoms and administrator needs. While one observer says *Tinker* clearly does not allow a student to voice "his opinion of the Vietnam War in the middle of a math class" [32:280], and the Supreme Court held that noisy picketers in front of a high school were properly stopped from disrupting classes [*Grayned*], *Tinker's* admonition that the "material disruption" concept cannot be applied blindly, but only in consideration of circumstances, has caused differences of opinion among judges.

Most courts do agree that a final determination of disruption or interference cannot be made by school officials, since such a determination would be a highly discretionary one, based on the particular educational philosophy and practice at each school. A student's First Amendment rights must be based on a broader scope than one principal's view of those rights relative to local circumstances, and the Supreme Court held that what a school believes to be disruption and

interference "is not necessarily dispositive for constitutional purposes" [35:1486-1487]. This is not to indicate that circumstances from school to school will not be of crucial concern to a court, but that a review of those circumstances will likely be made by the judge and will not be accepted at face value as reported by school officials.⁴ For instance, students acting a certain way in a loosely structured classroom might not be considered disruptive, while students acting similarly in a more traditional, tightly structured classroom would be materially interfering with educational purposes. Are students' First Amendment rights more restricted in the latter case than in the former? It is just such circumstances that require judges to independently view the situation in each case and not rely solely on administrators' opinions [35:1491].

For instance, in *Sullivan (I) v. Houston Independent School District*, a federal District Court took a broad view of the *Burnside-Tinker* rule and held that two students suspended for distributing underground newspapers on their high school campus should be readmitted to school. School officials had contended that students were reading the paper during class and that school operations were being disrupted. The court ruled that the disruptions were minimal and not serious enough to warrant denying the students' First Amendment rights. The court also noted that the school officials might have suspended the students because the administrators were offended by the paper's contents, a reason the court would not uphold. To the contrary, it saw the paper as "primarily intended as a discussion and comment upon problems affecting student-administrator relations" [*Sullivan I* at 1341]. The Supreme Court in *Tinker* held that administrators must "be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" [at 509]. The *Sullivan (I)* court ruled that, lacking narrowly drawn regulations, school officials could not seriously discipline students involved in writing or distributing newspapers on or off the school grounds during school or non-school hours unless such actions materially and substantially disrupted school operations [at 1341].

Justice Fortas's observations regarding university campuses are equally valid concerning high schools: "The public character of a university does not grant to individuals a license to engage in activities

⁴ "Neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase ('clear and present danger') should be crystallized in a rigid rule to be applied inflexibly without regard to the circumstances of each case" [*Dennis* at 508].

which disrupt the activities to which those facilities are dedicated" [17:46-47].

Some observers suggest the interpretation of "substantial disruption of or material interference with school activities" would become easier if it were equated with the traditional "clear and present danger" test first enunciated by Justice Holmes fifty-five years ago: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" [Schenck at 52]. Thus, the circumstances as well as the content of the expression must be examined to determine if there is a clear public interest in restricting an individual's liberties. In *Tinker*, the Court indicated the "public interest" is in seeing that oral or written expressions do not interfere with "the work of the schools or the rights of other students" [2:992]. Courts have not agreed upon the applicability of "clear and present danger" to the secondary student cases, and the Supreme Court, in refusing to review a number of cases which seem contradictory to one another but which all claim to be following the *Tinker* guidelines, has not cleared the confusion [Breen; Sullivan II; Scoville; see also 48:1040].

It has also been suggested that confusion exists because the *Tinker* decision left in doubt several other important issues: What evidence is necessary to support a forecast of disruption due to students' expression of their views? Can "material and substantial disruption" include non-physical and covert disruption? What age levels are covered by *Tinker*—junior high school, elementary school [Tinker at 516]? Lower courts have wrestled with these questions, but, again, with little help from the Supreme Court.

Extension of the "Interference" Rule

Courts have held that student expression may be curtailed if school officials could properly forecast a disruption of educational activities due to dissemination of material.

The Supreme Court's language in *Tinker* that "the record does not demonstrate any facts which might reasonably have led school authorities to *forecast* substantial disruption . . ." [at 514, emphasis added] adds a new dimension to the question. It is not necessary for administrators to prove disruption *did* occur because of the exercise of students' First Amendment rights, but only to show that disruption *would* occur in the future. Surely the difficulty is apparent in requiring both school officials and the courts to be predictive rather than to show what in fact happened [35:1484].

The Court in *Tinker* puts into the public school context a community-wide test it had previously specified: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe [expression] except where such [expression] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" [*Brandenburg* at 447; 22:53]. This sets very broad parameters for the community, but are those parameters applicable on school grounds, particularly since school officials cannot agree on the point at which a certain activity might become disruptive? It has been suggested that a possible compromise is to set a threshold level below which courts will not tolerate interference with students' First Amendment Rights. However, that level could be raised if circumstances in particular schools (open classroom situations, for instance) would allow for it [22:53].

What constitutes a valid prediction of future disturbance? It is settled law that "a mere anticipation of disturbance is not sufficient to abridge First Amendment freedoms" [1:31, citing *Tinker* at 514 and *Brandenburg* at 447], and a Court of Appeals has said administrators' intuitive feelings that disturbance is imminent are not sufficient grounds for punishment of otherwise protected expression [*Shanley* at 974]. Another judge would not sustain a school board's language that distribution of an underground newspaper "could substantially disrupt normal educational activities" and "might incite lawless action" [*Vail* at 599], holding that the board's language ("could" or "might") does not sufficiently hold to the *Tinker* standards.

Attempting to put the *Tinker* guidelines in more practical language, the American Civil Liberties Union has stated that administrators may step in when distribution "would clearly endanger the health or safety of the students, or clearly and imminently threaten to disrupt the educational process, or might be of a libelous nature" [4:11-12, quoted in *Quarterman* at 59]. The Seventh Circuit tried to clarify *Tinker* by noting that the forecast rule "is properly a formula for determining when the requirements of school discipline justify *punishment* of students" for exercising their rights but is not a shield behind which administrators can hide while attempting to indiscriminately

censor student publications. The Seventh Circuit further noted that "in proper context, [the] use of the word 'forecast' . . . means a prediction by school officials that existing conduct . . . —if allowed to continue—will probably interfere with school discipline" but emphasized that it did not mean students had to announce their intentions beforehand so school officials could decide whether to prohibit the proposed expressions of opinion [*Fujishima* at 1358; *Shanley* at 973].

The District Court in *Sullivan* (I) used the prediction guideline to rule that administrators could not show disruption would have resulted from distribution of an underground paper. The Seventh Circuit also used the rule in *Scoville v. Joliet Township High School District 204*. Sixty copies of "Grass High," a fourteen-page underground paper which contained poetry, reviews, and editorials, were distributed by two students on their high school campus. One editorial criticized a pamphlet of school rules which was distributed by the school to incoming students, deprecated the principal, and advised students to disregard school regulations. The editorial said in part, "[H]e has got to be kidding . . . I urge all students in the future to either refuse to accept or destroy upon acceptance all propaganda that Central's administration publishes. . . ." The editorial called attendance regulations "utterly assinine" and accused a school dean of having "a sick mind" [*Scoville* at 15-17]. The two students who published and distributed the paper were suspended. In denying their petition for readmission, the District Court held that language directed to an immature audience whose reaction could adversely affect the school is not protected by the First Amendment and that any claimed First Amendment rights must be subjugated to the good of the school.

However, using the forecast rule, the Seventh Circuit overturned the lower court decision by narrowing the *Scoville* issue to whether school officials could have reasonably predicted substantial disruption of school activities [*Scoville* at 13]. The court held that distribution of the journals did not on its face indicate disruption would occur [2:992]. Not even the students' possible intention to cause disruption, said the court, was significant. The court admonished administrators to have clear evidence forecasting a disturbance before repressing students' rights to free expression [1:13-14]. The Supreme Court denied *certiorari*.

One authority took issue with the *Tinker* and *Scoville* decisions, noting that courts "overrode an educational decision of school authorities respecting the degree to which the particular controvers[ies] impeded the learning experience. It substituted its own educational notions . . . about the internal operations and purposes of public schools" [35:1487]. It is on this basic conflict between school officials having authority over their own institutions and the courts attempting

to protect students' First Amendment rights that most *Tinker* decision critics base their complaints. One court has said that the point at which students' rights must give way is to be determined by school officials, "and . . . within the range where reasonable minds may differ, their decisions will govern" [*Butts* at 732]. Another has held that administrators need not wait until disruption actually occurs before they act, that, "in fact, they have a duty to prevent the occurrence of disturbances" [*Karp* at 175]. Yet another notes that if "substantial facts" point to a possible disturbance, "the judgement of the school authorities in denying permission [to distribute]" in order to prevent a disturbance "will normally be sustained" [*Quarterman* at 59]. It is not a certainty of disruption that *Tinker* requires, says one judge, but the existence of facts which would "reasonably" lead to a forecast of disruption [*Karp* at 175]. Forcing administrators to "spend their time and expend considerable psychological energy" to determine just what the threshold is to reasonably predict trouble "hardly seems an efficient utilization of resources," but it is necessary because it is not certain that courts will uphold administrators' actions if they are based solely on advocacy of violating school rules [22:54; 2:991]. The *Scoville* decision shows this, although the dissenting judge in *Scoville* argued that advocacy of disregard of school rules is on its face disruptive, regardless of whether students actually take the advice [*Scoville* at 15; 22:54].

The *Tinker* forecast rule, then, seems to mean that students' rights "must be balanced against the duty and obligation of the state to educate students in an orderly and decent manner to protect the rights not of a few but of all the students" [*Schwartz* at 242]. If administrators can adequately show that distribution of student publications will disrupt that state obligation, their actions in punishing students for such distribution will be upheld. But "undifferentiated fear" of a disturbance, to use the language in *Tinker*, is not sufficient.

Students' Rights: Particular Circumstances

Expressing Unpopular Opinions

While the Supreme Court has noted that any departure from the majority viewpoint "may cause trouble," it has emphasized that such risks must be taken by school officials in allowing expressions of unpopular opinions. Controversial matters, whether of a school-wide or nation-wide scale, may also be discussed, and that expression is protected. A question remains about protection for unpopular or controversial viewpoints in high schools where officials can prove racial tension exists.

While the First Amendment includes the right to "receive information and ideas" [Stanley at 564; Lamont], what if those ideas are unpopular, either with a portion of the intended audience or with those who govern the individuals expressing the unpopular opinions? Can the expression then be suppressed? While the content of several student publications involved in court cases might be disagreeable, most judges accept the aforementioned comment from Justice Holmes that freedom of expression is for the "thought we hate." Additionally, in a case cited with approval in *Tinker*, the Supreme Court has stated:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of [expression], though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. [Terminiello at 4; Shelton]

In regard to the high school situation, the *Tinker* court specifically noted:

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk. [at 508]

This comment also indicates that freedom of expression on campus is not limited to controversial non-school matters, but may include school-related issues [33:153].

"Negativism" in student publications also is not sufficient reason for banning their distribution. Whether a publication is negative, of course, is in the eye of the reader. Mere criticism of school officials or policies, while perhaps unpopular with administrators and students, is protected by the First Amendment. Illogical, even irrelevant criticism, can be discerned by high school students and will be ignored; rational criticism is a necessary commodity if a "marketplace of ideas" is to exist [Shanley at 972]. As one court has noted, "The First Amendment's protection of . . . expression is part of the Bill of Rights precisely because those governed and regulated should have the right and even the responsibility of commenting upon the actions of their appointed . . . regulators" [Shanley at 973].

Controversial matters fall in the same category. In overturning the suspension of five students for distributing an underground paper to fellow high school students, the Fifth Circuit held that articles concerning marijuana laws and birth control assisted students in becoming better informed about social issues and were certainly not words that "inherently prompt only divisiveness and disruption" [Shanley at 972].

Controversy does not include only matters of significant public interest. In *Hatter v. Los Angeles City High School District*, students, from a position across the street from the school grounds, passed out flyers opposing the school dress code and asking students to boycott the annual chocolate drive, a school-sponsored activity designed to raise funds for several student functions. The students' actions were in violation of a rule adopted by the school district requiring that all matter distributed or exhibited on school property be authorized by a responsible member of the administration. The students were suspended. A District Court judge held that the issues involved were "without weight or substance and voice[d] no question of constitutional proportions" [Hatter]. On appeal, however, the Ninth Circuit noted that because school policies "may not affect the adult community or concern the nation as a whole is of no moment. . . . It is not for this or any other court to distinguish between issues and to select for

constitutional protection only those which it feels are of sufficient social importance" [Hatter at 675].⁵

There is another part of the picture, however, that is cloudy. Thus far, it would seem that *Tinker* clearly brought under its protection all issues students wished to discuss in a nondisruptive fashion. But courts have held that some political communication or symbols involving racial or ethnic identification may be banned under certain circumstances [48:1039]. *Guzick v. Drebus* involves a student who wore a button publicizing a peace rally to a public high school in East Cleveland, Ohio. The second day the student wore the button, he asked his principal if he could distribute leaflets about the rally. The request was denied and he was ordered to remove the button. The student refused to do so and was suspended. Four weeks after the Supreme Court handed down its *Tinker* decision, a District Court upheld the student's suspension on the grounds that the high school was racially mixed and that certain buttons might provoke and exacerbate racial tensions. Since, the court reasoned, the administration could not successfully apply a "selective rule," allowing some buttons and banning others, the school's long-standing rule forbidding all such nonverbal expression was allowable.

In affirming the decision, the Sixth Circuit noted: "[None of] the many great decisions which have forbidden abridgement of free speech . . . were composed or uttered to support the wearing of buttons in high school classrooms. We are not persuaded that enforcement of such a rule . . . would have excited like judicial classics" [Guzick at 600]. Some authorities believe that if the suppression of one political opinion is unconstitutional, as the Court held in *Tinker*, all must be, *a fortiori*, unconstitutional [3:170]. However, it would seem that circumstances in a particular school can alter that logic. Since the Supreme Court refused to grant *certiorari* to the *Guzick* case, it appears that, indeed, "the right to express one's point of view on a politically controversial issue (such as the Vietnam War), in an orderly fashion, is constitutionally protected in a racially homogeneous school in Des Moines, Iowa; [but] the same right is prohibited in a high school in racially tense East Cleveland, Ohio" [3:169].

The interpretation seems to be reinforced in a second case. Blacks at a recently integrated Florida high school contended that using the confederate flag as the school symbol and "Rebels" as the official nickname significantly increased racial tensions and possible violence. A

⁵ "The rights of free speech and a free press are not confined to any field of human interest" [Thomas at 531].

District Court upheld this contention and also forbade students from wearing a "confederate battle flag" on their clothes [*Augustus*].

Aside from situations involving racial tensions, however, courts have held that administrators cannot forbid expressions of unpopular viewpoints in the absence of disruption. School officials cannot validly contend that a portion of students do not wish to be exposed to certain ideas and that therefore the ideas will be prohibited. Students are free to refuse copies of papers or not to look at arm bands or buttons. However, if the papers or buttons are forced on students in a disruptive manner (as in the *Blackwell* "freedom buttons" case), students can be suspended for creating a disturbance.

Similarly, administrators cannot validly contend that the orderly operation of the school would be impaired if students could nondisruptively distribute newspapers on the grounds that if a large number of students were involved disruption would "naturally" occur. Such a projection of disruption is "entirely speculative and hence must be discounted"; it cannot be considered sufficient cause for prohibiting distribution of student publications [*Dixon II* at 254].

Administrators' concerns with controversial issues may be laid to rest by Judge Goldberg's words in the *Shanley* case:

Tinker's dam to school board absolutism does not leave dry the fields of school discipline. . . . *Tinker* simply irrigates, rather than floods, the fields of school discipline. It sets canals and channels through which school discipline might flow with the least possible damage to the nation's priceless topsoil of the First Amendment. Perhaps it would be well if those entrusted to administer the teaching of American history and government to our students began their efforts by practicing the document on which that history and government are based. Our eighteen-year-olds can now vote, [and] serve on juries . . . , yet the board fears the "awakening" of their intellects without reasoned concern for its effect upon school discipline. The First Amendment cannot tolerate such intolerance. [at 978]

Off School Grounds

School officials have no more authority over off-campus than on-campus distribution of student publications. Courts are split concern-

ing whether administrators have any control at all over off-campus distribution.

Some school officials believe their authority over students extends further than the school grounds, to times when they are off campus and even during non-school hours. This is still an unsettled question [Sullivan I at 1340; 50; 12:1128-1157]; however, one court has clearly denied a claim of such wide-ranging power concerning distribution of protected student publications.

In *Shanley v. Northeast Independent School District*, students at a San Antonio, Texas, high school who were in the process of applying for admission to prestigious colleges were suspended for three days for distributing what the school characterized as an "underground" newspaper. The paper was totally authored and produced by the students, not using any school equipment, materials, or time, and was distributed before and after school on the sidewalk of a street adjoining the school grounds (separated from the school by a parking lot). Although some copies were seen on campus, the students discouraged distribution there and no disruption of classes occurred which could be attributed to the newspaper. The court, describing the newspaper as "one of the most vanilla-flavored ever to reach a federal court" [Shanley at 964], held that the publication could not be considered libelous, obscene, or inflammatory. During their time of suspension, the students had zeros entered in their academic records, thus, according to the court, prejudicing their chances to be admitted to college. The Fifth Circuit ordered that the zeros be removed and that the students be given an opportunity to make up the work they missed.

The court said it should shock parents that "their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts" [at 964]. The court reasoned that schools could have no more power to punish students for expressing their views off campus than on school grounds. Since *Tinker* and its progeny held that non-disruptive publications which were neither obscene nor libelous were protected under the First Amendment when distributed on campus, such publications must also be protected off campus.

The *Sullivan* (I) court arrived at the same result, but through a different approach. There the judge was of the opinion that off-campus activities generally would not come under the school's authority. The court found it improbable that off-campus distribution of a student publication could create a disturbance on campus, thus indicating that such distribution could not be prohibited under the guise of preventing material and substantial interference with educational activities [at 1341].

However, one court has taken an opposite view. Upholding the suspension of two students who distributed a newspaper across the street from the school (because, the court said, the publication contained profanity and thus ran afoul of the state education code), a federal District Court ruled in *Baker v. Downey City Board of Education* that "school authorities are responsible for the morals of the students while they are going to and from school, as well as during the time they are on campus" [at 526]. Additionally, according to the court, since the students knew copies of the paper would be taken onto campus, distribution off school grounds did not take away the school's authority over their conduct.

The *Baker* reasoning regarding off-campus distribution seems to be too strong. Although the *Shanley* court would not hold that *any* attempt to regulate off-campus activities could not pass constitutional scrutiny [at 974], it is clear that administrators certainly have no more power off the school grounds than on [*Sullivan I* at 1341]. On the other hand, school officials also cannot force students to exercise their First Amendment rights *only* off campus [32:292-293].

Disruption by Others

Students who comply with regulations concerning time, place, and manner of distribution should not have their First Amendment rights abridged because other students threaten disruption as a reaction to a publication.

Several cases involving student publications have been concerned with varying degrees of disruption caused by students who received the newspapers [*Sullivan I*; *Scoville*]. In determining whether students may be prohibited from distributing papers because administrators could prove material and substantial interference with the educational process, it is necessary to ascertain whether disruption was caused by the student publisher or by other students hostile to them. A fundamental First Amendment concept is that officials are obligated to regulate the hostile conduct of others rather than abridge an individual's right to free expression, unless that expression takes the form of "fighting words," words which on their face incite violence and lawlessness [*Chaplinsky*; *Bachellar*; *Gregory*].

It is not a simple task to determine whether disturbance is caused by a speaker or distributor of a publication or by the recipients. However, it does seem clear that if a student complies with reasonable rules regarding time, place, and circumstances of distribution in a non-disruptive manner, his protected expression should not be abridged because others are unruly [2:997]. If it were otherwise, an easy way to stop free expression of ideas would be to organize a disruptive demonstration [1:31-32].

Reference is often made to Justice Douglas's description of the First Amendment as protection for speech that "induces . . . unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger" [*Terminiello* at 4]. This being so, students "who are lacking in self-control [and who] tend to over-react" should not be allowed to cause non-disruptive students, who are exercising their rights, to suffer [*Sullivan I* at 1340].

One court has noted that if the content of a student publication might create a disturbance by those opposed to such views, administrators may more carefully regulate the time, place, and manner of distribution than under other circumstances [*Shanley* at 973-974]. That would be one method of quelling disruption without abridging a student's First Amendment rights. The Supreme Court has held that such abridgment should be a last resort: "[E]ven if a compelling state interest were shown, the burden remains on the state . . . to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights" [*School District* at 265]. Thus, the school has an obligation to impose the least restrictive method of avoiding disturbance where distribution of student publications is involved [2:997-998].

As an example, in the *Sullivan* (I) case school officials attempted to show that disruption occurred due to distribution of an underground paper. They noted one stack of newspapers was found in a boys' restroom, including copies in a towel dispenser, others were found inside sewing machines in a classroom, and some teachers had to take copies away from students during classes. However, the court asked, "Why were those not disciplined who were disruptive? . . . It is their misconduct . . . which should have been stopped" [*Sullivan I* at 1342]. The court indicated that the student publishers had specifically asked other students not to hand out the paper during school or on school grounds. Under such conditions, the court held, administrators were not free to punish students for exercising their First Amendment rights in a non-disruptive manner instead of punishing those who actually created the disturbance.

Additionally, the Sixth Circuit seems to have taken a view in opposition with *Sullivan* (I) when it upheld the suspension from college

of eight students who distributed leaflets the court described as "false, seditious and inflammatory." The leaflets described administrators as "despots," denounced censorship of student publications, and urged students to "assault the bastions of administrative tyranny." The court upheld an administration "forecast" of disturbance based on a visit by twenty-five students to the dean's office warning him to "get rid of this group of agitators." In dissenting from the court's holding, Judge Celebreeze contended that the administrators should have attempted to stop any disturbance proposed by the twenty-five students and allowed distribution of what he considered "abrasive, abrupt, rude, possibly false and inflammatory," but still protected, literature [*Norton* at 198-199, 208].

Students' Rights: First Amendment Limitations

Obscenity

Obscene expression is not protected by the First Amendment, though the definition of obscenity may vary depending upon the group to which the material is directed. Generally, however, even in high school publications, words considered in context must appeal to prurient sexual interests to be considered obscene.

As has been discussed previously, the First Amendment is not absolute. The Supreme Court has held that certain forms of expression do not enjoy the status of protected speech or press, notably obscene and libelous material and commercial advertisements. Importantly, however, this does not necessarily mean that the state can impose prior restraint on such expression, but that those from whom it emanates are responsible *after* publication for any abuse thereof. Some courts have held that this precept does not hold in the case of high school students, and that prior restraint of obscene or libelous material would be permissible on the secondary level [*Baughman* at 1349; *Eisner* at 809]. Another court, however, contends that the more general rule is in effect for high school students—no prior restraint, but appropriate punishment after distribution [*Fujishima*]. (Prior restraint will be discussed further in a later section.) In either case, material that is provably obscene is not protected by the First Amendment guarantees.

The definition of obscenity currently used by the Supreme Court has evolved through many cases over a number of years. In the 1972-73 term, the Court in *Miller v. California* summarized its previous stance, somewhat altered it, and determined that material is to be tested for obscenity on the following basis: (1) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest in sex; (2) whether the work portrays, in a patently offensive manner, "sexual conduct specifically defined in the applicable state law"; and (3)

whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value [at 22; see also *Jenkins*].

However, this standard is not directly applicable to high school students, because the Court has held that the definition of obscenity may vary from group to group. In a case decided five years before *Miller*, the Court had said that an acceptable standard for determining whether material directed toward children is obscene is whether it "predominantly appeals to the prurient, shameful or morbid interest of minors, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors" [*Ginsberg* at 633; see also 37:124-130]. Along with this standard for minors, the Court stressed that censorship based on a finding of obscenity must be premised on a rational finding of harmfulness to children [*Ginsberg* at 641]. Thus, school administrators may forbid obscene materials on school grounds toward the end of controlling disruptive student conduct.

Several important points have arisen from cases involving censorship of allegedly obscene material on high school campuses. In *Vought v. Van Buren Public Schools*, a federal District Court held that student publications containing words which, taken out of context, may appear to administrators as profane or vulgar cannot be considered obscene and potentially disruptive of the educational process if books and magazines containing those words can be found in the school's library [at 1396]. This is a two-edged sword, however, in that some administrators might consider removing such reading matter from the library so as not to be caught in the inconsistency of censoring the student publication while allowing the books and magazines.

Also, while the Supreme Court has recently held that the testimony of expert witnesses is not required in proving material to be obscene, several courts have utilized such witnesses [*Koppell* at 459]—for example, a university English professor [*Vought* at 1388]—in making their rulings.

Most significantly, courts have ruled that words which administrators have labelled profane or vulgar do not fit the definition of obscenity when, taken in context, they do not appeal to prurient sexual interests [*Fujishima* at 1359; *Sullivan II* at 1162-1167]. Such words used as expletives or as dialogue depicting "street talk" do not fall within the legal definition of obscenity, which specifically involves sexual matters [*Vail* at 599; see also *Cohen*].

One of a number of rules concerning student publications imposed by the Indianapolis School System forbade distribution of "any literature that is . . . obscene as to minors." In *Jacobs v. Board of School Commissioners*, the Seventh Circuit ruled that administrators' charac-

terization of a student paper, "The Corn Cob Curtain," as obscene was incorrect. The court noted, "A few earthy words relating to bodily functions and sexual intercourse are used in the copies of the newspaper. . . . Usually they appear as expletives or at some similar level." Even though the paper contained a cartoon depicting a series of incidents in a bathroom, the court held that such material was a very small part of the publication and in no "significant way [was] erotic, sexually explicit, or . . . could plausibly be said to appeal to the prurient interest of adult or minor" [at 610]. This was true, the court said, even allowing for the widest possible differences between adults and high school students "with respect to perception, maturity, or sensitivity." The court found that the occasional presence of "earthy words" in a student publication would not be likely to disrupt normal school activities.

Koppell v. Levine involved a school-sponsored literary magazine, an annual collection of student essays and poetry chosen by the student editors with approval from the faculty adviser and the chairman of the high school's English department. The issue in question before the District Court was duplicated at the end of one school year, but too late for distribution. The next fall, the school principal impounded the magazine, claiming he found it obscene. A story written by one of the student editors used "four-letter words" as part of the vocabulary of an adolescent character in the story and contained a description of a movie scene where a couple "fall into bed" [at 458]. Appealing the principal's decision through the school hierarchy took seven months, a delay the court called entirely too long.

The court found that the magazine contained no passages intended to excite sexual desires or appeal to prurient interests. The dialogue was realistic and not offensive to adults or minors. Also, such words appeared in "respected national periodicals and literature" in the school library. In fact, the court called the story "demonstrative of unusual talent." Finding no circumstances which could warrant abridging the students' First Amendment rights, the court ordered the magazine copies distributed so long as it was done in a non-disruptive manner.

A case decided earlier than *Jacobs* and *Koppell*, *Baker v. Downey City Board of Education*, upheld the suspension of two students for distributing an underground paper containing "profanity" and "vulgarity." The two students were also removed from their offices as student body president and senior class president. They had distributed nine issues of "Oink" just outside the school's main gate and just before the first class of the day. The tenth issue, however, contained profanity in certain advertisements and in an article entitled "Student as Nigger," written by a then-teaching assistant at San Fer-

nando Valley (California) State College and widely reprinted in underground papers.

A federal district judge denied the students' claim for relief. School officials claimed distribution of the paper tended to disrupt school operations and diminish control and discipline. Some teachers testified that there were disruptions in their classes because of "Oink," while others testified to the contrary. The court held that the California Administrative Code prohibited students from using profane and vulgar language at school. Ruling that pornography was not an issue in the case, and that the definitions of "vulgar" and "profane" were sufficiently clear, the court upheld the school authorities. Distinguishing the case from *Tinker* and *Burnside* because of "Oink's" use of profanity, the court noted that while students have the right to criticize and dissent, they may be more severely restricted in their method of expression than their elders.

Libel and Severe Criticism

While libel can be punished by court awards of monetary damages, courts have considerably narrowed the definition of actionable libel. Debate continues over the propriety of student criticism of school officials, although such criticism could be considered actionable libel only if actual malice were proved [New York Times Co. (I) rule].

Of major concern to many school personnel connected with student publications is the question of libel. Fears of large libel suits costing the school district hundreds of thousands of dollars are unfounded, and while libel suits against school districts are not unheard of, such concerns are not an acceptable rationale for sweeping restrictions of students' rights of expression.

A libelous statement is one that defames the character of an individual, business, or product. It can either injure an individual in his relationships with other people or in his professional or business activities. It is generally an untrue statement published either maliciously or without thorough checking of the facts before printing the story. Anything printed in a publication can be grounds for libel action—headlines, pictures, stories, and even advertisements [36:76 ff].

Libel is a complex field of law involving questions such as whether the words were injurious on their face ("libel per se") or only in the context of other words ("libel per quod") and whether the intent of the public action was malicious or innocent [18:199-200]. While interpretation of libel laws has been considerably liberalized by courts recently, a publication can still lose a libel suit if it has been proved to defame someone with "knowledge that [the information] was false or with reckless disregard of whether it was false or not." This definition of malice comes from *New York Times Co. (I) v. Sullivan* [at 280], a ruling in which the Supreme Court said that public officials could be openly criticized, and if done without malice, the criticism would not be considered actionable libel, that is, the public official could not collect money for damage to his reputation.

Certainly public school administrators and teachers are public officials, since they are paid by taxpayers, responsible to citizens in the community, and hired by school boards which are given their authority by state legislatures. This does not mean that student publications are free from the danger of libel suits. Other students *are not* public officials [see *Gertz*]. Libel suits have been filed on behalf of students against student publications, although they are usually settled out of court.⁶ Further considerations are that the school district would likely not be held responsible for defamation in an underground newspaper, since the district would not have authorized or taken responsibility for the publication, and that it is generally difficult for state agencies (including school districts) to be held responsible for wrongs committed by their agents (such as a newspaper adviser) [45:27].

It is probable that courts will not grant to high school students the wide-ranging privilege of "nonmalicious misreporting" allowed the commercial press in *New York Times Co. (I)*. Most high school students do not seek that privilege but rather freedom to criticize school policies and school administrators. Such criticism is not likely to be considered actionable libel, but has been held to be gross disrespect and disobedience.

There are two schools of thought on this issue, one side being typified by the argument of law professor Sheldon Nahmod [32]. He sees some courts believing that the state has a societal interest in encouraging respect for school authorities and that this state interest could be the basis for prohibiting attacks against administrators even if such published attacks did not cause material and substantial interference

⁶ See Samuel Feldman, *The Student Journalist and Legal and Ethical Issues* (New York: Richards Rosen, 1973). It has been noted that research found "only one judgment against a school district for libel in a student publication." George E. Stevens and John B. Webster, *Law and the Student Press* 26 (Ames: Iowa State University Press, 1973).

with the educational process. Indirectly, *Ginsberg v. New York*, the Supreme Court case establishing different standards for determining obscenity in material directed toward minors than in that meant for adults, supports this view by emphasizing parental authority over their children's upbringing while at home and stressing the state's independent interest in the well-being of its young people. Nahmod is concerned that courts might accept this argument and extend it to the state's interest in students' respect for school officials, particularly since disrespect might tend to spread through the student population and erode authority and discipline in the school. Nahmod rejects this theory on the grounds that obscenity, unlike disrespect for authority, has traditionally been denied First Amendment protection. He believes that the *Tinker* rule requiring a showing of a proper forecast of disruption before expression is abridged could be circumvented by censoring severe criticism under the guise of a state interest in respect for authority.

Law professor Paul G. Haskell [22] presents the other side of the argument. Noting *Ginsberg*, he holds that the state's power to proscribe obscenity is not based on an actual showing of disruption, but on a conjecture that obscenity might have harmful consequences, because "the conventional wisdom" considers it harmful. Respect for school authorities, he believes, falls in the same category. He does not deny that "reasoned discourse" on school policies must be categorized as protected expression, as is discussion of social and political problems. Even "responsible student discussion of teaching methods and teaching competence" should be protected under the *Tinker* ruling. Ridicule of teachers and administrators, however, should be distinguished from the *Tinker* ruling, according to Haskell. "Mocking disparagement" serves only to hinder effective school operation. Certainly such ridicule could be proscribed under *Tinker* if it could be shown to have disrupted the school, but even in the absence of obvious disruption, it "is likely to produce damaging effects of a different nature which school administrators and teachers are sensitive to but which may elude the perception of others" [22:55]. Although students will exchange among themselves criticisms of teachers and school officials, Haskell sees it as unwise to allow such criticism wide distribution through printed publications, even though the causal relationship between disparagement and disruption might be difficult to prove in many cases. It is in distinguishing between honest criticism and ridicule that Haskell sees the difference between expression protected by *Tinker* and that which is not.

In two cases in part involving criticism or ridicule of school officials, punishment of students was overturned, and in one case the student's punishment was upheld. The *Sullivan* (I) case involved an under-

ground paper, "Pflashlyte," containing an article attributed to "Edmund P. Senile," a high school administrator obviously meant to be the students' principal, which read in part:

Ah wosh tew thank yew all for yore generosity en given me this oppertunity tew express mahself. Furst of all, ah wosh to say that ah'm proud as punch to be here an ah'm shure yew all are proud as punch to be en mah school. For mah fine capacity to suppress ideas, ah have been awarded this school and all yore minds. . . . And ther ain't no need to thank me, its mah sacred mission to save yew from them bastard hippies and sech like. . . . In closin, ah wont to inform yew of the next Senior Project. Under mah direction, the senior class is formin one of them extortion rackets to collect \$500 for a 17-foot facsimile of mah posterior to be erected at the front gate so that all students might kiss the baloney stone each day before classes. [at 1348]

The court, generally contending that the student writers were critical of school policy but mature and intelligent in their criticism, acknowledged that "Edmund's Thoughts" appeared to ridicule school officials. But the article did not approach the "fighting words" unprotected by the First Amendment [*Chaplinsky*] and did not seem to be obscene or libelous.

As noted previously, the Seventh Circuit in *Scoville* refused to allow punishment of students for distributing a publication containing, among other items, an editorial stating that the school dean had a "sick mind." The court, while calling such words disrespectful and tasteless, did not consider the editorial to justify a forecast of disruption in accordance with *Tinker*.

However, in *Schwartz v. Schuker*, a court upheld the suspension of a high school student for distributing an underground newspaper which called the principal "King Louis," "a big liar," and a person having "racist views and attitudes."

Invasion of Privacy

Certain publications can be considered invasions of privacy, even though they are not libelous, and can be punished by awards of monetary damages.

The law of privacy, which some see as replacing libel laws as a means of protection from the media's intrusion [36:59, 172-184], has been very broadly defined as "the right to be let alone" [10:29]. Invasion of an individual's privacy is an area of some confusion because, although court cases involving privacy have been decided for more than eighty years, it is a part of the law that is still evolving. No case involving student publications and the question of privacy has yet been decided by the courts. This certainly does not mean students have not invaded the privacy of individuals, but, as noted previously concerning libel cases, student publications are not likely to be sued for such breaches of law.

There are several actions of the press which can cause them to be sued for an invasion of privacy: (1) the publication of private, although truthful, information about an individual; (2) the publication of false, although not defamatory, material; (3) the unauthorized use of a person's name or picture in an advertisement [41:233-247]; (4) intrusion into a person's solitude; and (5) the use of fictionalized material, that is, adding false to factual material for the sake of entertainment or dramatic quality [36:184, 202].

The first two elements differ from libel in that, first, truth without malice is a strong defense against a charge of libel, but it is not necessarily a defense for invasion of privacy, and second, material which is not necessarily defamatory or libelous may constitute an invasion of privacy. It should be noted that it is not required that a state have a privacy law for a privacy suit to be brought [*Time, Inc.*], since privacy can be considered to be a matter of common law or a penumbral right granted by any one of several amendments in the Bill of Rights [*Griswold*].

While using a person's name or picture for commercial purposes without his consent almost always means that person can successfully sue for invasion of privacy, publishing private information about a person not normally in the public light is a more complex question. Should the person be involved in a newsworthy incident, that information can be published, and courts consider a broad range of matters to be "newsworthy." However, invading a person's home to report perfectly legal actions will be considered an invasion of privacy by most courts. Also, people involved in newsworthy events lose their privacy only in regard to this event, not in other aspects of their lives.

Publishing statements that are not true, but not defamatory, can lead to successful privacy suits in two types of incidents: publication of a fictionalized account of an actual happening, if a real person is identified as being connected with the event; and placing a person in a "false light," that is, using his picture or name out of context, for

instance, in an actual situation, but one in which the individual was not a participant.

The concept of newsworthiness, convincing a court that it was in the public interest to report an event and include the individual in such a report, is the primary defense against a privacy suit. Consent to use a person's name or picture, of course, is also a defense.

Advocacy of Violence or Lawlessness

Courts are divided as to the degree students may advocate disregard of school rules and still enjoy First Amendment protection. Communications which clearly incite to violence or lawlessness are not protected by the First Amendment.

As indicated previously, *Tinker* leaves room for school officials to control disruptive expression, such as printed material, containing words which on their face "inflict injury or tend to incite an immediate breach of the peace" [*Chaplinsky* at 572] or words which "have all the effect of force" [*Near* at 701]. Most recently, the Supreme Court reinforced the right of the state to abridge the freedom of expression where "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" [*Brandenburg* at 447].

Such words, however, are not easily and obviously identified. Of concern are the *degree* of threatened disorder, the reasonableness of the state's determination that such a threat exists, and the point at which the state should intervene. Not only the content of the expression, but also the circumstances, including the context of the expression and the audience to which it is directed, must be considered [39:1327]. Expression involving a high school campus and secondary school students can narrow the parameters of First Amendment protection.

Cases involving high school students which have touched on this aspect of the First Amendment have been concerned with advocacy to disregard *school* rules rather than municipal, state, or federal statutes. While no case has clearly shown that such advocacy has caused

students to actually ignore school rules, it has been noted that a general breakdown of respect for campus regulations may follow the allowing of such expression [22:37, 52]. Courts have upheld punishment of students in three college cases involving varying degrees of advocacy to disregard school regulations.⁷

To the contrary, however, are two high school cases. In the *Scoville* case, which involved material which could be construed as advocating that students ignore attendance regulations, students were ordered reinstated to school and suspensions struck from their records. In *Quarterman v. Byrd*, the court admitted that language in the underground paper involved was "inflammatory and potentially disruptive" [at 56]. The court specifically referred to a statement printed in capital letters:

... WE HAVE TO BE PREPARED TO FIGHT IN THE HALLS AND IN THE CLASSROOMS, OUT IN THE STREETS BECAUSE THE SCHOOLS BELONG TO THE PEOPLE. IF WE HAVE TO—WE'LL BURN THE BUILDINGS OF OUR SCHOOLS DOWN TO SHOW THESE PIGS THAT WE WANT AN EDUCATION THAT WON'T BRAINWASH US INTO BEING RACIST. AND THAT WE WANT AN EDUCATION THAT WILL TEACH US TO KNOW THE REAL TRUTH ABOUT THINGS WE NEED TO KNOW, SO WE CAN BETTER SERVE THE PEOPLE!!! [at 55-56]

However, the students in the *Quarterman* case were suspended for violating a regulation prohibiting distribution of material without prior permission, not because of the paper's contents. Under such circumstances, the court did not determine whether the paper contained material which was not constitutionally protected.

⁷ *Norton v. Discipline Committee*; *Jones v. State Board of Education* (distributing literature urging boycott of registration); *Speake v. Grantham* (distributing false notices that classes would not meet).

Students' Rights: Administrative Regulations Allowed by Courts

Powers of School Administrators

Courts have traditionally allowed school authorities the power to regulate the conduct of their students.

In addition to the First Amendment restrictions on student press freedom—obscenity, libel, “fighting words,” and disruptive expression—students experience restrictions due to the power courts have given school administrators to regulate their own institutions. School officials traditionally have strong supervisory power over students. The state’s interest in maintaining its educational system is a compelling reason, courts contend, to allow reasonable regulations essential to upholding order and discipline on school property [*Burnside* at 748]. The Supreme Court has stated that “liberty of expression guaranteed by the First Amendment can be abridged by state officials if their protection of legitimate state interests necessitates an invasion of free speech” [*Dennis* at 510; *Whitney* at 376; *United States I* at 377]. Courts have emphasized the necessity for schools to prohibit and punish acts, including acts of expression, which tend to undermine the school routine [*Blackwell* at 753], and many decisions reinforce the judicial conviction that school authorities have the power to stringently regulate their students [*Blackwell*; *Griffin*; *Ferrell*]. In *Tinker*, the Court reiterated that it has “repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools” [at 507]. It has been noted that such authority may be stronger when involving publications, since they are distributed to and seen by more students than are exposed to arm bands or buttons [33; see also *Burnside*].

One view in this argument is represented by Dan L. Johnston, a lawyer for the *Tinker* children, who observes that in that landmark case the school failed to present any evidence of disruption caused by the arm bands, although he believes such evidence was available. Instead, the school based its case on its assumed absolute authority to

determine the actions of students within the schools during school hours, apparently believing that the First Amendment did not apply in the school environment. Johnston substantiates this by recalling a conversation with a Des Moines school official who expressed deep concern at the outcome of the case: "You know, if I cannot make a regulation limiting the length of my students' hair, I don't believe I have the authority and the power to prevent fornication in the hallways of my school." Johnston holds that such *absolute* power is not required in order to exercise *necessary* power [25:1025, 1027].

The other end of the spectrum may be exemplified by a District Court judge, who, ruling on a regulation forbidding beards and moustaches on male high school students, emphasized that courts should not be involved in public school matters except in extreme cases, not only because educational matters should be left to experts in the field, but also because students who accept public education at public expense "subject themselves to considerable discretion on the part of school authorities" as to how they should act while in school [Stevenson at 101]. Johnston also points to a dissenting opinion written in a long-hair case by the trial judge in *Tinker*, who is now on the Court of Appeals for the Eighth Circuit, which in essence held that students must learn "blind obedience to absolute authority" and that regulations with no national base may be used to punish students who violate such rules [25:1027, referring to *Torvik*].

While not all courts take such a strong stand, many have limited high school students' freedom of expression by giving administrators power in several areas: the power to impose prior restraint under certain conditions; regulation of students due to their relative immaturity; regulation over circumstances of distribution of student publications; and the power to punish students for gross disobedience.

Prior Restraint

Outside the high school setting, approval of material before publication is allowed only in "exceptional circumstances." Some courts have seen prior restraint as acceptable in high school if there are procedural safeguards. One court has specifically held prior restraint to be impermissible in high school.

The framers of the Bill of Rights abhorred the censorship and licensing laws in England and assumed that the First Amendment incorporated the common law ban on prior restraints [13:651-652]. It was thought that governments should not have the power to require material to be submitted to them and accepted before allowing distribution. The Supreme Court in *Near v. Minnesota* has stated that generally only in exceptional circumstances will prior restraint be permitted—for expression which would hinder the nation during war-time, for expression which would incite violent or forceful overthrow of the government, and for obscene expression [at 716]. Forty years after that decision, the Court again ruled against prior restraint in the Pentagon papers case, holding that the government “carries a heavy burden of showing justification for the imposition of such a restraint” [*New York Times Co. II* at 714]. Only for motion pictures has the Court allowed a system of prior restraint, even then requiring safeguards against discriminatory imposition of censorship [*Freedman*].

The question of whether prior restraint is constitutionally acceptable in the special circumstances of a public high school has been at the root of four cases reaching Circuit Courts of Appeals and has been touched on in several others. The courts are in disagreement, although a majority clearly would allow prior submission providing it were accompanied by proper procedural safeguards.

In *Eisner v. Stamford Board of Education*, students distributed off school grounds three issues of an underground paper, which they had written and published at their own expense. When they attempted to distribute the fourth issue on their high school campus, administrators warned that they would be suspended for violating a rule requiring prior submission of all material before dissemination.⁸ The students' challenge to the policy reached the Second Circuit Court of Appeals, which found it devoid of guidelines which would require a prompt administrative decision. However, the court refused to adopt the position of the District Court and rule that prior restraint would never be allowable in public high schools, ruling only that the specific regulation in question was not sufficient.

The *Eisner* court had several suggestions to help administrators write a valid regulation which would allow them to properly control student publications without being required to go to court each time

⁸ The rule stated: “No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration” [at 833]. Guidelines for such approval were stated as: “No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others” [at 834].

disruption was anticipated. The policy should prescribe a definite brief time within which an initial decision must be made, describe the kinds of disruptions which would justify censorship, and indicate the areas within the school where distribution of material would be considered appropriate. In all cases, the burden of proof would be on school officials to show their actions comported with the *Tinker* guidelines, and the court would not consider a "bare allegation" of facts to be sufficient. The court assumed that the school board would not write a policy giving itself more power over student publications than the *Tinker* decision allowed, that it would not suppress printed material that "would create only an immaterial disruption," and that the prior submission rule would be invoked only when a substantial distribution of material is anticipated.

In *Quarterman v. Byrd*, a tenth-grade student was twice suspended for distributing underground newspapers in violation of a prior submission rule.⁹ As in *Eisner*, the court held the rule invalid, but only because it did not contain criteria to be followed by school officials in determining which publications should be granted or denied permission and did not contain procedures for prompt review of such decisions. The court contended that school officials may exercise prior restraint over materials to be distributed by students during school hours on school grounds if they can reasonably forecast "substantial disruption of or material interference with school activities" [*Quarterman* at 58].

In *Shanley v. Northeast Independent School District*,¹⁰ the Fifth Circuit declared administrators had little control over students off school grounds and during non-school hours, which is where and when the underground paper in question was distributed. Despite also noting the mild content of the paper, the court agreed that there is "nothing unconstitutional per se in a requirement that students submit materials to the school administration prior to distribution." The court saw the purpose of prior submission as preventing disruption, not stifling expression. Thus, given that public high schools must maintain discipline and an orderly educational process, the requirement of prior approval becomes "simply a regulation of speech and not a prior restraint" [at 969]. This change in terminology, however, does not

⁹ The rule stated: "Each pupil is specifically prohibited from distributing, while under school jurisdiction, any advertisements, pamphlets, printed material, announcements or other paraphernalia without the express permission of the principal of the school" [at 55].

¹⁰ The rule stated: "... [A]ny attempt to avoid the school's established procedure for administrative approval of activities such as the ... distribution of petitions or printed documents of any kind, sort, or type without the specific approval of the principal shall be cause for suspension" [at 965].

alter the reality of the regulation. Additionally, the court would not limit the prior restraint rule to obscene, libelous, or inflammatory material, although it held that the burden of demonstrating reasonableness becomes "geometrically heavier" on school officials when other types of publications are involved. Finally, for such a policy to be valid, the court insisted on procedural safeguards, including specifying how students were to submit material for review, requiring a prompt decision, and allowing students to appeal adverse administrative decisions.

Decided earlier than *Eisner*, *Riseman v. School Committee* apparently took the same stance. A student was prevented from distributing in school an anti-war leaflet and "A High School Bill of Rights" on the basis of a rule forbidding students and others connected with the school from being used "in any manner for advertising or promoting the interests of any community or non-school agency or organization without the approval of the School Committee" [at 148]. Although upholding both administrators' responsibility to prevent school disruption and their right to reasonably and equitably regulate the time, manner, and place of distribution, the First Circuit called the regulation vague and noted that it was undoubtedly originally meant for purposes other than controlling student-produced literature. Importantly, however, the court stated that the rule "does not reflect any effort to minimize the adverse effect of prior restraint" [at 149-150, citing *Freedman*]. In citing the *Freedman* case, which allowed prior censorship of films as long as stringent procedural guidelines were applied, it seems the First Circuit would allow prior restraint in high school if rules for prompt review and an appeals procedure were part of the regulation [8:587].

In *Koppell v. Levine*, high school students asked a District Court to decide on the constitutionality of a system of prior restraints. Because the case did not involve a specific student-administration confrontation, the court would only indicate that it accepted the *Eisner* ruling permitting prior submission if adequate procedural guidelines were available. The court also indicated that a reasonable time period within which an initial decision concerning acceptability should be made would vary depending upon the type of material involved—from a poem to a book.

Baughman v. Freienmuth involved students who received a warning letter from their principal after they distributed pamphlets on school grounds. While acknowledging that pamphleteering is a protected activity under the First Amendment and that a system of prior restraint may allow vague rules to suppress protected criticism of school regulations and officials, the Fourth Circuit ruled that prior restraint is permissible in public high schools if there are strict pro-

cedural safeguards. The court held that the specific rule in question was invalid because it did not specify what would happen if no decision at all were made. However, a precisely drawn regulation would be permitted, said the court, if it (1) specified what material would be forbidden so that a "reasonably intelligent" student would know what is and is not acceptable, (2) carefully defined "distribution," (3) provided for prompt approval or disapproval of submitted material, (4) specified what would happen in the event of administrative inaction, and (5) provided an appeals procedure.

In *Vail v. Board of Education*, school officials prohibited distribution of an underground paper on the grounds it "could substantially disrupt normal educational activities" and "might incite lawless action" [at 599]. A District Court held this to be an unconstitutional imposition of prior restraint because of the vagueness and overbreadth of the board's reason. The court, however, said that prior restraint in public high schools would be permissible with adequate procedural guidelines if officials could reasonably forecast substantial disruption or if the material were obscene or libelous. The court emphasized that where such a forecast exists, administrators could act immediately to prevent disruption. The court gave as examples a publication which is "pornographic or advocates destruction of school property or urges 'physical violence' against teachers or fellow students" [at 600].

The District Court in *Poxon v. Board of Education* was unclear as to its stance on prior restraint. The case involved students who had applied for and been denied permission to circulate an underground paper. They asked the court to rule on the constitutionality of the prior submission rule. The court said that the school officials had not presented facts which would either justify a system of prior restraint or show that methods less offensive to the First Amendment were not practical alternative solutions. The implication is that, given those facts, the court might uphold prior restraint for high school students.

In the face of these decisions, the Seventh Circuit clearly stated that prior restraint is no more permissible in public high schools than it is for citizens in general. In *Fujishima v. Board of Education*, two students were suspended for having distributed copies of "The Cosmic Frog," an underground paper they had published. A third student was suspended once for circulating an anti-war petition and a second time for distributing anti-war leaflets while students were outside for a fire drill. All three sued to test the validity of the Chicago Board of Education's prior submission rule.¹¹ The case reached the Court of

¹¹ The rule stated: "No person shall be permitted . . . to distribute on the school premises any books, tracts, or other publications, . . . unless the same shall have been approved by the General Superintendent of Schools" [at 1356].

Appeals, where the school board argued that the rule was constitutional since it did not require approval of content, but only of the act of distribution. The Court disagreed, holding that the content would indeed be a consideration, thus making the rule invalid as an unconstitutional prior restraint in violation of the First Amendment. The court specifically contended that the *Eisner* decision was bad law and combined the approaches in the *Tinker* and *Near* decisions in making its ruling. The school board could make reasonable regulations regarding time, place, and manner of distribution, said the court, and students could be punished *after* distribution for violations of those rules or for other abuses of their First Amendment freedoms (distributing obscene or libelous publications, for instance), but regulation of student publications may not take the form of prior restraint.

Which approach is correct? Does *Tinker* allow prior restraint in high school despite the Supreme Court's rulings in *Near* and the Pentagon papers cases? Do the special circumstances of public high schools—the need for order and the proper functioning of the educational system—permit administrators to determine what printed material may be disseminated solely on the basis of that material's contents and the school situation as seen by those administrators?

An article in the *Yale Law Journal* [39] effectively disputes the rulings that prior restraint in high schools is constitutionally permitted. Reading the *Tinker* test of "material and substantial disruption" as similar in kind (though not in degree, since it allows discipline at a lower level of disturbance) to the "clear and present danger" and "fighting words" tests, the author of the article contends that the latter tests have not been interpreted by the courts as allowing prior restraints and, therefore, neither should the *Tinker* test. In the *Tinker* decision, the Court's stress on *facts* seems to be the element distinguishing a valid prediction of disturbance from the "undifferentiated fear or apprehension" of disruption which the Court would not allow as a basis for discipline. Nor can the special circumstances of a public school be considered sufficient to allow prior restraint. Schools are not jails, as the *Tinker* Court points out, but places to train students to function in a democracy. The article's author does not deny that reasonable regulation of time, place, and manner of distribution is permissible and that more stringent regulation of these elements may be necessary in a tense school atmosphere, but contends that such rules must be for *all* printed material and imposed without first reviewing content. While outside the school context courts have allowed prior restraint of obscene material, no high school case has thus far involved provably obscene matter, and the author of the *Yale Law Journal* article does not consider the possibility of obscenity to be an adequate rationale for permitting a prior restraint system.

It would seem that the *Eisner* court used a different logic, holding that the *Tinker* guideline would be met because prior restraint of distribution would be imposed only if school officials foresaw a danger of disruption. The *Yale* author does not see the *Tinker* test as allowing such prior restraint any more than previous First Amendment tests allow it, except in extreme circumstances. The *Fujishima* court agreed with this, though emphasizing that discipline *after* publication was permissible if disruption could be proved or if the material was otherwise not constitutionally protected.

The weight of court decisions is heavily on the side of allowing narrowly drawn systems of prior restraint for public high school students, provided that procedural guidelines are included. However, the Seventh Circuit has taken a strong stand in opposition. Final resolution must come from the Supreme Court.

Relative Immaturity of Secondary Students

Courts have noted that high school students are less mature than college students and adults. Some courts have used this to justify restricting students' freedom of expression.

Courts have consistently viewed high school students as being relatively less mature than college students and adults. It is primarily this factor that has allowed many courts to agree that the extent of First Amendment application may depend on the age and maturity of those for whom communication is meant [*Vail* at 598]. Supreme Court Justice Stewart has stated, "[T]he First Amendment rights of children are not co-extensive with those of adults" [*Tinker* at 515]. The Supreme Court first voiced this opinion thirty years ago [*Prince* at 170] and has reiterated it several times since [*Ginsberg* at 638; *Tinker*; 14:938-939].

This concept is easily extended to high school students who, surely, also have restricted freedoms in other areas: they are forced to attend school until they are a certain age, they can be punished by their parents, they are subject to corporal punishment in the schools of most states, they cannot legally execute binding contracts, and so on [22:53].

Some courts, then, are able to justify not granting high school students freedom of expression at the same level as it is granted to college students. The concepts of "impressionable adolescents," a captive audience (since high school is essentially mandatory), and the varying backgrounds of students in a secondary school are used as bases for this distinction [22:43; 1:22].

One expert sees the question as hinging on whether or not courts view high school students as capable of dealing with controversial concepts and ideas at variance with those commonly accepted in the community [35:1491]. As indicated previously, some courts have prescribed to a belief that today's high school students do exhibit a sufficient level of maturity to warrant lessening the degree of authority administrators may exert over them.

Several courts have referred directly to the level of secondary students' maturity in ruling on freedom of expression cases. In *Schwartz v. Schuker*, a District Court judge upheld a student's suspension for distributing an underground paper which referred to the school principal as "a big liar" and accused him of having "racist views." In doing so, the judge referred to high school students as being more adolescent and less mature than college students and "less able to screen fact from propaganda" [at 240-242]. The Fourth Circuit in *Quarterman v. Byrd*, while discussing the constitutionality of a regulation allowing prior restraint of student publications, essentially agreed with the *Schwartz* court. It said that certain publications may be protected when directed toward adults, but not so when meant for high school students, since the First Amendment rights of the two groups are not "co-extensive." The court also drew a line between the rights of college and high school students. The District Court in *Egner v. Texas City Independent School District* emphasized the "captive audience" concept, and also stressed that high school students are emotionally immature. However, while citing law professor Charles Alan Wright's contention that the parameters for high school students' expression should be narrower than those for college students [at 1053], the Seventh Circuit in *Scoville v. Board of Education* noted that the District Court, when originally hearing the case, should not have been so concerned over the students' immaturity [see 28:227].

Regulation of Distribution

School administrators clearly have the right to set and enforce reasonable restrictions on the time, place, and manner of distributing student publications.

In numerous cases, the Supreme Court has struck down unreasonable strictures on First Amendment rights. However, it has consistently upheld the authority of officials, including school administrators, to set and enforce *reasonable* restrictions on the time, place, and manner of distributing printed material. These restrictions, which are for the purpose of preventing disorder, must not relate to the publication's *content*, but only to the circumstances of circulation [*Cox*; *Tinker*; 39: 1326]. For instance, a regulation forbidding distribution of a student publication during prime class time and in, say, the principal's office would likely be considered reasonable. A rule allowing distribution only from 4:30-5 p.m. in the boys' locker room would be unreasonable, being too restrictive and having no rational relation to the educational process. Such regulations must relate to the school grounds¹² and to school hours [*Shanley* at 969], and even reasonable rules cannot be applied in a discriminatory manner—all protected student publications must be treated with equal consideration [*Sullivan I* at 1340].

As courts disagree over the extent to which prior restraint can be imposed on high school students, they also disagree on whether a prior submission rule can be utilized to assure compliance with time, place, and manner restrictions. One has noted that to the extent such a submission rule is utilized for that purpose, it is valid [*Baughman* at 1348]. Another, however, holds that the burden is on administrators to tell students of the acceptable method of distribution, and not upon students to submit material for inspection before such conditions are set [*Fujishima* at 1359].

Courts have generally upheld reasonable restrictions on the manner of distributing protected material in order to avoid disturbances. The same reasoning applies on the high school campus, but courts go even a step further. They view the high school situation as a heavily populated and concentrated setting where school officials and teachers are responsible for "compressing a variety of subjects and activities into a relatively confined period of time and space" [*Shanley* at 969], thus

¹² But note that one court has indicated that forbidding distribution while students were across the street from the school during a fire drill would be acceptable [*Fujishima* at 1359].

forcing more restrictive measures—though reasonable and evenly applied ones—than would be required in the general community [Sullivan I at 1340]. However, the Seventh Circuit in *Jacobs* held that a rule forbidding distribution while *any* classes were in session was not sufficiently narrow, since there might be times when a number of students were on campus while only a few classes were being held [at 609]. Thus, school officials have the authority to set reasonable conditions concerning the time, place, and circumstances of distribution of student publications, but the rules must be narrowly drawn and for the purpose of preventing disruption of normal educational activities.

Gross Disobedience or Disrespect

In cases where a court has seen a pattern of gross disobedience by a student, even though dissemination of protected expression was involved, the question of the student's First Amendment rights may not be reached. Instead, punishment will be upheld by the court on grounds of disrespect or disobedience.

The majority's opinion in *Tinker* and Justice Black's dissent in that case differed on several points, one of particular significance. The Court stated that the key is not whether school rules are followed, but whether those rules are constitutionally valid [1:30]. Justice Black, however, was very much concerned with whether rules are obeyed, expressing the fear that high school students "will be ready, able, and willing to defy their teachers on practically all orders" [at 525].

Similarly, there are differences of opinion as to where to draw the line regarding what rules may be imposed. One lawyer says school officials must learn that their power over students is not absolute, that they cannot impose a rule, no matter how unconstitutional, and then punish students for disobeying it [25]. However, Sheldon Nahmod, a law professor, believes the *Tinker* court intended to allow discipline of students, even in the absence of a specific regulation, for causing substantial disruption in school. He cites situations where courts have first determined if an individual engaged in flagrant misconduct and

therefore does not merit a stringent application of the overbreadth doctrine before examining whether his First Amendment rights were violated [35:1484]. For high school students, this has been phrased as insisting the student come to court with "clean hands," that is, to be able to show he did not egregiously flout a rule for the sake of "testing" authority [*Sullivan II* at 1077]. If it can be shown he did, the court will not likely reach the constitutional issue.

Several courts have held that gross disobedience of or disrespect for school authorities may alone be sufficient to uphold punishment of students, without reaching constitutional questions regarding freedom of expression or due process.¹³ The theory adopted in these cases is that students have ways of testing a regulation's validity without violating it, particularly if having courts reach constitutional issues, thus perhaps overturning certain school rules, would allow students to flagrantly violate rules with impunity. In *Healy v. James*, a case involving the question of a college administration officially recognizing a student political group, the Supreme Court stated that open disregard of school rules would be a sufficient and independent reason for imposing discipline. The Fifth Circuit has said the same for high school students, emphasizing "the right of school authorities to punish students for the flagrant disregard of established school regulations" [*Sullivan II* at 1077].

In *Schwartz v. Schuker*, a student was punished for refusing to surrender copies of an underground newspaper to a school official upon request. The student had previously distributed peace and student strike materials both on and off the school grounds and had been told not to do so again without specific permission. He was told further violation would constitute a "serious breach of school discipline." Eight months later he was interviewed by an administrator about student strike materials that were to be distributed. He did not admit to involvement in the distribution and refused to supply names of students who might be. A month later, he was told he would not be able to distribute copies of the underground paper, "High School Free Press #5," based on his principal's reading of the previous issue which the principal said, and the District Court agreed, contained "four letter words, filthy references, abusive and nihilistic propaganda." Nevertheless, the student did distribute copies of the paper, which criticized the school principal as "a big liar," said he had "racist views and attitudes," and called him "King Louis." The student was punished, not for distributing copies of the paper, but for refusing to surrender them to the school dean when ordered to do so and for advising another

¹³ For a thorough discussion of such cases through 1970, see Paul G. Haskell, "Student Expression in the Public Schools: *Tinker* Distinguished."

student to do likewise. At a hearing, it was recommended that he be graduated early or transferred to another school.

The court said it was not clear whether the student was punished for engaging in protected First Amendment activity or for disobedience, and noted that there was no showing of disruption caused by the student's actions. Regardless, the court said the student brought papers on campus after being told not to and did not surrender the papers when ordered to do so, thus showing defiant disobedience of school authorities, which the court saw as justification for suspension or even expulsion.

Similarly in *Graham v. Houston Independent School District*, three high school students distributed copies of "The Plain Brown Watermelon," an off-campus newspaper. They were told by administrators to stop distribution and leave school until they did so. They were not formally expelled and agreed to meet with their parents and the principal to discuss the situation. However, they refused to cease distribution. The students admitted that they knew of the school rule against distributing material without prior permission and that they had been warned on two occasions that punishment would result if they violated the rule. The court stated that the students were reprimanded for disobedience rather than dissemination of protected material and that such disobedience, even when coupled with an activity involving free expression, could be punished if administrators could show that disruption did or would have resulted.

In both cases, apparently, the courts admitted that the students were involved in protected expression and probably would not have been disciplined if they had not violated a school rule. Contradictorily, the courts did not see the rule as having a chilling effect on the students' First Amendment rights [1:30]. In *Tinker*, the students knew they were violating a district rule by wearing arm bands, but the Supreme Court did not consider that dispositive. The difference in *Schwartz* and *Graham* seems to be the "spiteful and disrespectful tone" the courts detected in the students [22:50]. Additionally, the District Courts believed that the validity of the regulations could be tested without flagrantly violating them.¹⁴

The question of free expression also was not reached in *Segall v. Jacobson*, in which a student was suspended and transferred to another high school against his wishes after he distributed a "rather puerile, name-calling article containing obscenities, among other vulgar matters" [at 1121], in an underground paper which used the forged nameplate of the school-sponsored newspaper. Earlier, after an incident

¹⁴ See *Walker v. Birmingham*, which held that one is liable for punishment when violating an injunction without first attempting to have it dissolved.

engaged in by the same student, during which a fellow student was injured, he had voluntarily signed an agreement to obey school rules and not to engage in disruptive activity. Administrators contended that distribution of the paper disrupted the educational process. The court did not decide the constitutional issues of freedom of expression and due process, but considered only the claim of disobedience and refused to overturn the student's transfer.

In *Sullivan (II) v. Houston Independent School District*, a case stemming from earlier litigation by the same name, a high school junior was selling an underground paper near the entrance to his school. The principal noticed a letter in the paper using "coarse language," told the student he was selling the paper in violation of the school's prior submission rule, and asked him to cease. The student continued distribution, and, when called to the principal's office to be informed that he was suspended and that his parents had been notified, he slammed the door and shouted, "I don't want to go to this goddamn school anyway," within hearing of two of the principal's female assistants. The student returned to campus several times in violation of his suspension, and, on the day of the conference with his parents and the principal, he was again selling the underground paper. The principal threatened to call the police if he did not stop. In reply, he shouted what the court referred to as "the common Anglo-Saxon vulgarity for sexual intercourse" [at 1074].

The court viewed these actions as a pattern of gross disobedience and held that in the face of constant violations of school regulations, administrators were not powerless to discipline him "simply because his actions did not materially and substantially disrupt school activities" [at 1076]. Thus, as in *Graham*, the court felt that gross disobedience of school rules allowed school officials to take punitive action without meeting the *Tinker* guidelines. In fact, the *Sullivan* court held that the student's conduct outweighed his claim of First Amendment protection despite the fact that protected expression was involved. Additionally, the Fifth Circuit noted that students seeking confrontation and "desiring the attendant publicity" might also be risking their First Amendment rights [*Shanley* at 966].

Other Administrative Means of Limiting Student Press Freedom

Various means of inhibiting students' First Amendment freedoms have been used by school administrators and, in some cases, have been upheld by courts.

Tinker and many succeeding cases have made it clear that administrators cannot prohibit otherwise protected student publications simply on a supposition or feeling that disturbance may take place. Courts require facts on which to base that decision [*Shanley* at 970]. As is indicated by the cases in which gross disobedience was the determining factor in punishment, some administrators have used other means to suppress or discourage students' freedom of expression.

In *Einhorn v. Maus*, a federal District Court upheld the right of school authorities to put on students' permanent school records, which were to be forwarded on request to colleges and prospective employers, that the twenty-two students involved had distributed literature at their high school graduation, had worn arm bands reading "Humanize Education" to the ceremony, and had ignored instructions from school officials not to engage in such actions. The court admitted that *Tinker* allowed arm bands to be worn if disruption did not occur, as it did not in this case, but ruled that the students could not show that irreparable harm would result from the notations on their records. Since the information was factual, the court ruled, school officials had a right and duty to make such notations. The court did not deny that the students' actions were protected by the First Amendment [at 1170]. Presumably such notations could also be made on the permanent records of students who write and distribute underground newspapers, although the actual writing and distribution are not repressed.

Another attempt to inhibit student publications was made by school officials in Indianapolis who prohibited the distribution of literature unless the name of every person and organization involved in the publication was clearly listed in the literature. In *Jacobs v. Board of School Commissioners*, the Seventh Circuit ruled this unconstitutional, citing the Supreme Court's recognition of the "historical importance of anonymous publications as a vehicle for criticising oppressive practices and laws" [*Talley*]. The Court of Appeals indicated that anonymous student publications can serve the same purpose in school and that, without anonymity, fear of reprisals could dissuade students from

discussing controversial but important school policies.

That courts sometimes circumvent First Amendment questions in cases involving student publications can be seen in *Segall v. Jacobson*, in which a District Court judge specifically noted that such constitutional questions as freedom of press and due process during the student's punishment were not to be reached. According to the court, the point simply was whether the student's actions, viewed against a background of previous disobedience to school authorities, constituted disruptive conduct and, if so, whether administrators could reasonably punish him. The court agreed with both contentions.

C. Michael Abbott, a law professor, has suggested that school officials need not respond to troublesome student publications by suspending or expelling their producers. He notes that a verbal reprimand, including a discussion of the ethics of responsible journalism, might be effective. He also emphasizes that the school should ensure a channel for student dissent to be disseminated to the student body. Not only would this avoid First Amendment confrontations, he believes, but it would also help prevent supplying students with a *cause celebre*, which may be counterproductive for school discipline [1:28].

Students' Rights: Administrators' Responsibilities

Vagueness and Overbreadth of Rules

School regulations concerning student dissemination of publications on high school campuses must be drawn clearly and narrowly so that persons affected by them are able to understand what is permitted and proscribed and so that the rules do not prohibit expression that is otherwise protected.

Rules to regulate secondary students' conduct are a natural part of high school life. Prior to *Tinker* and its progeny, distribution of student publications was generally subsumed under broad rules covering a variety of areas. After *Tinker*, schools began drawing regulations applying specifically to student publications. Both kinds of rules, however, have come under attack by courts for being unconstitutionally vague and/or overbroad. If rules are found to be thus deficient, any punishments meted out under them cannot be sustained [*Fujishima* at 1359].

The Supreme Court's "void-for-vagueness" guideline stipulates that a rule "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process" [*Connally* at 391; *Zwicker*]. Words in the regulation must provide "an ascertainable standard of conduct" [*Baggett* at 372] and be "susceptible of objective measurement" [*Cramp* at 286]. Thus, a regulation must contain definite rules of conduct and specify that certain violations will result in certain punishments [31:129]. This doctrine has been specifically noted by several courts dealing with high school students' rights cases [*Riseman* at 149; *Sullivan I* at 1343-1344], though initially noted in a college-level case in which a District Court judge held the term "misconduct" to be vague [*Soglin* at 990]. The *Sullivan* (I) court accepted this reasoning and held that the fundamental due process concepts embodied in the "void-for-vagueness" doctrine "must be applied 'in some measure' even to high schools. The

'measure' should reach only to rules the violation of which could result in expulsion or suspension for a substantial period of time." Specifically, the court said high school students faced with serious punishment have a right to "a clear, specific normative statement," although it does not have to be as narrowly drawn as criminal statutes [at 1344]. One authority sees the need for specific, thorough codes on the high school level as even more important than the need for codes on the college level [48:1046].

When the vagueness of a school regulation is questioned, the burden is on the school to justify it [*Vail* at 597]. That justification, however, cannot be that a rule *could* be interpreted reasonably. In just such a situation, school officials interpreted a rule which among other things required administration approval before distributing any publications as allowing punishment for any violation of the regulations, without basing its claim on potential or actual disruption. If "a rationale constitutionally sufficient on its face" cannot be established for the rule, punishment for violation of the rule in the absence of further justification cannot be upheld. The court pointed out that the school had given the best proof that a rule which *could* be read reasonably is not sufficient, since the school had applied a "thoroughly unreasonable" interpretation [*Shanley* at 975].

To avoid vagueness, then a regulation applied to high school students "must be sufficiently definite to provide notice to reasonable students that they must conform their conduct to its requirements and may not be so vague that persons of common intelligence must guess at its meaning" [*Baker* at 523, citing *Budd* at 1034-1035].

Certain words and regulations have been held to be vague as applied to the secondary school situation. The word "distribution," which on its face seems to be, as one court put it, "an ordinary term which find[s] adequate interpretation in common usage and understanding" [*Baker* at 513], has been found to be unconstitutionally vague in at least three sets of circumstances. In a case involving a prior restraint rule, the Fourth Circuit held that some material may be disruptive to the school only when a substantial number of copies are distributed, while other material—pornography, for example—may be disruptive upon the distribution of only a single copy. Thus, a proscription against "distribution" with no further explanation is not sufficiently explicit [*Baughman* at 1349]. The Second Circuit held similarly, while noting that "distribution" could mean passing notes from one student to another or exchanging magazines among students [*Eisner* at 811]. Finally, the Fifth Circuit noted that an assistant principal in the high school seeking to suppress a student publication had stated that "one student handing 'Time' magazine to another student without the permission of the principal" was violative of the school rule in question [*Shanley* at 977]. Again, the court said such a rule was unconstitution-

ally vague. If a student can be punished "on the strength of this blunderbuss regulation for passing out any printed matter" even after school hours and off school grounds, the court asked, why then could not a student be punished for handing to another student a Bible on Sunday morning [*Shanley* at 977]? That same court also said the terms "libelous" and "obscene" are not sufficiently "precise and understandable" by high school students and officials without a legal background to be acceptable. In fact, the court noted, some lawyers and judges admit to not knowing the precise meanings of these words [*Baughman* at 1350-1351]. Even the word "misconduct" has been held vague by at least one federal court [*Soglin*] and not vague by at least two others [*Norton*; *Esteban*].

An example of a high school regulation held to be unconstitutionally vague is one involved in the *Sullivan* (II) case: "The school principal may make such rules and regulations that may be necessary in the administration of the school and in promoting its best interests. He may enforce obedience to any reasonable and lawful command" [at 1072].

The other prong in the "void-for-vagueness" doctrine is overbreadth, that is, "Could a reasonable application of [the rule's] sanctions include conduct protected by the Constitution?" [*Sullivan I* at 1343]. For instance, a student suspended under a rule forbidding possession of obscene material told the court he did not know whether or not the underground paper he had in his locker fell under the rule's definition of "obscene" [*Vought* at 1395-1396]. A rule, then, is overbroad, when its reach covers constitutionally acceptable conduct as well as that which is prohibited, and even "benign" intentions on the part of those who devise such a rule cannot save it [*Shanley* at 976].

Courts have indicated some general conditions rules must meet to avoid the "void-for-vagueness" doctrine. First, the rule must be specific, including precise places and times where possession and distribution of student publications are prohibited. Second, the rule must be understandable to persons of the age and maturity it covers. Third, the rule must not prohibit protected activity, such as that which is orderly and nondisruptive [*Jacobs* at 604-605]. Fourth, the rule must include guidelines stating clear and demonstrable criteria school officials will use in applying the rule [*Shanley* at 977]. Finally, the rule cannot put a student in jeopardy of punishment because of the unwarranted reaction or response of another individual [*Jacobs* at 611 (District Court decision)].

There is not, however, total agreement regarding the application of the "void-for-vagueness" doctrine to students. In their General Order on Student Discipline, while holding that detailed codes of student conduct are counterproductive, at least on the college level, a group of federal judges in Missouri stated that the vagueness doctrine "does

not, in the absence of exceptional circumstances, apply to standards of student conduct. The validity of the form of standards of student conduct . . . ordinarily should be determined by recognized educational standards" [General Order at 146-147; 21].

Two high school cases disagree with the General Order. In *Jacobs v. Board of School Commissioners*, students challenged a lengthy series of rules which generally forbade distribution by students in school buildings or on school grounds of obscene or libelous material, or material "not written by a student, teacher or other school employee," except advertisements for school publications. Particularly, the regulation provided, "No student shall distribute in any school any literature that is . . . either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any [school], or injury to others" [at 604-605].

The Seventh Circuit held this wording vague and overbroad because the rule could punish innocent action by not explicitly stating what is unlawful. The penalties for violating the regulation were sufficiently severe, said the court, that the dangers inherent in the rule of inadequate warning and arbitrary enforcement inhibited students' First Amendment rights. The court questioned several definitions in the rule, including that of "significant disruption." Is heated discussion considered disruption? Is decorum in the lunchroom a normal educational purpose? Does "injury to others" mean only physical harm or also hurt feelings and impairment of reputation?

The court emphasized, despite the school's contention that the regulation's wording followed the *Tinker* guidelines, that a constitutional standard is not necessarily sufficient in a regulation to adequately warn students as to what is considered an abuse [*Jacobs* at 605].

In *Vail v. Board of Education*, a rule forbidding the distribution of non-school sponsored, written material within "[the] schools and on school grounds for a distance of 200 feet from school entrances" was found to be overbroad. A federal District Court held that the regulation did not "lend itself to any limitation in terms of intent, time, place, and manner of distribution" [at 598], thus including constitutionally protected publications within its purview.

Due Process

Lengthy suspensions or expulsions, including those in cases involving student publications, cannot be ordered without procedures which comport with procedural due process, including notice of charges and a formal hearing.

Justice William O. Douglas has written:

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law. [*Joint Anti-Fascist Refugee Committee* at 179]

The requirements of procedural due process, that certain steps must be taken before an individual can be denied a protected right, are applicable only to deprivation of the Fourteenth Amendment's protection of "liberty" and "property." It has been held that a child's right to an education is included in these terms [*Vail* at 602; *Meyer*; but see *Serrano*] and that suspensions, except for short periods, and expulsions require procedural due process—but there are some differences of opinion as to what that entails. It is agreed, however, that arbitrary or capricious punishment will not be upheld.

Many student publications cases have involved, at least in part, the question of due process in the punishment procedure, several cases turning on this very point [*Sullivan II*; *Vought*]. One judge has noted that high school students, even more than college students, need school officials to adhere to "concepts of procedural fairness and reasonableness" [*Sullivan I* at 1343]. In fact, quite apart from any threatened court action, administrators have a professional obligation to comport with procedural due process [29].

Under what conditions must such procedures as proper notice and a hearing be put into force? Courts have agreed that short-term suspensions for the purpose of stopping or punishing overt misbehavior may be decreed without a hearing. But at what precise time the elements of due process become necessary is unclear. Various courts have held that the point is when more than a three, five, or ten day suspension is ordered, and some judges have said that the time span may be even longer. However, one court has stated that the key is the effect of the punishment on the student, that even a one-hour suspension could require the imposition of constitutional due process

standards if that hour happened to coincide with a final examination with no makeup allowed [*Shanley* at 967]. Another court has defined the crucial point as when punishment "adversely affects the basic right of a student to an education" [*Vail* at 603]. Expulsions clearly demand imposition of due process requirements.

It was in *Dixon v. Alabama State Board of Education* that the autonomy of public educational institutions to punish students was first overturned. The Fifth Circuit held that administrators are clothed in governmental authority and any actions they take which can substantially injure a student must comply with minimal requirements of procedural due process. While noting, as subsequent courts have done, that the process need not be equivalent to that required for criminal charges, the *Dixon* court held that minimum standards include (1) notice of the specific charges and the grounds which, if proven, would justify the proposed punishment, and (2) an opportunity for a hearing, the nature of which "should vary depending on the circumstances of the particular case," but which must be more than a casual, informal inquiry [at 158-159].

The District Court in the *Vail* case listed the following as minimal standards of procedural due process: (1) the student and at least one parent or guardian shall be furnished written notice of the charges and nature of the evidence; (2) after a sufficient time to prepare a defense, a formal hearing shall be held; (3) any decision to suspend the student shall be based on a "dispassionate and fair consideration" of the evidence showing the student committed an act for which suspension is a proper punishment [at 603]. To these should be added the *Dixon* points of giving to students the names of witnesses against them and the nature of testimony expected and allowing students to see a report of the hearing's findings and decisions. Courts dispute whether further due process elements are necessary on the high school level, such as presence of counsel and an opportunity to cross-examine witnesses.

While defects in procedural due process may be grounds for overturning a student's punishment, it is also true that such defects in initial proceedings before school officials can be rectified in subsequent hearings [*Sullivan II* at 1077]. However, because of the question of impartiality of school officials who preside over hearings and who also may be involved in the incident under examination, a court will usually independently re-examine the evidence before making a decision [35: 1486].

Courts are very concerned that students' rights are upheld in procedures leading toward suspension or expulsion, and school officials would do well to be certain their procedures comply with the minimum due process standards. Some states, such as Indiana, have gone beyond minimal standards through legislative action [44].

Students' Rights: Additional Matters

Advertising and Sales

Commercial advertising is not protected by the First Amendment, and student publications may refuse any such ads they wish. Otherwise protected editorial advertisements, however, must be accepted by a student publication which accepts any advertising. Courts are divided concerning whether students should be allowed to sell publications on high school campuses.

The Supreme Court has held that commercial advertising is not protected by the First Amendment [*Valentine*] and that privately owned publications may reject commercial advertising for products and services whenever they wish. The situation involving editorial advertising, however, is somewhat less clear. The Court has said that advertising discussing "matters of the highest public concern" deserves First Amendment protection [*New York Times Co. I* at 266], but the Seventh Circuit allowed four Chicago newspapers to refuse to print an advertisement from the Amalgamated Clothing Workers of America explaining its objection to the store selling imported clothing at the cost, the union said, of jobs for American workers [*Chicago Joint Board*].

On the high school level, the question of editorial advertising is quite clear: a public school-sponsored newspaper which accepts any advertisements must accept editorial advertisements.

The key case in this area is *Zucker v. Panitz*, in which a principal refused to allow the student newspaper to print an advertisement opposing the Vietnam War after the school editorial board had approved it. The case is particularly interesting for the differing views expressed concerning the purpose of a high school student newspaper. The plaintiffs alleged that the purpose of the "Hugenot Herald" was "to provide a forum for the dissemination of ideas and information by and to the students of New Rochelle (N.Y.) High School. Therefore, prohibition of the advertisement constitute[d] a constitutionally proscribed

abridgement of the freedom of [expression]." The defendants argued that the publication "is not a newspaper in the usual sense, but is a 'beneficial educational device' developed as part of the curriculum and intended to inure primarily to the benefit of those who compile, edit and publish it" [at 103]. The principal also said it was a standing administrative policy to limit news and editorials to matters pertaining to the high school and its activities. He contended that not allowing an advertisement expressing a point of view on any subject not related to the high school was necessary to prevent the paper from becoming mainly an outlet for the dissemination of news unrelated to the school.

The court stated that if the paper's "contents were truly as flaccid as the defendants' argument implies, it would indeed be a sterile publication. Furthermore, its function as an educational device surely could not be served if such were the content of the paper [at 103]. The court reviewed copies of the paper and cited several articles on draft procedures and draft information, school funds for outside charities, federal aid for preschool through high school facilities, state issues, and community treatment facilities. The court concluded that the paper had been "used as a communications medium regarding controversial topics and that the teaching of journalism includes dissemination of such ideas. Such a paper is truly an educational device" [Zucker at 103].¹⁵ The principal's argument that the paper would be just as valuable an educational tool if it were compiled and then filed without publication was found to be without merit "since, in fact, the paper is published and sold. . . . Moreover, the paper includes letters to the editor, clearly a part of the journalistic experience which would be truncated were the newspaper merely a dummy" [Zucker at 103]. The problem, said the court, "lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities" [at 104]. The court concluded that, since the paper was open to free expression of ideas in the news, editorial, and letters columns,

[i]t is unfair in the light of the free speech doctrine, to close it as a forum to this specific idea. . . . It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted non-disruptive modes of communication, may be precluded from doing so. . . . [at 102]

No case has yet specifically involved the question of allowing school-sponsored publications to refuse obscene or libelous editorial adver-

¹⁵ Compare with *Lee v. Board of Regents* at 1100-1101 (court overruling refusal of student editors to print editorial advertisements in college newspaper).

tisements, but they would presumably be allowed to do so. Additionally, the Supreme Court has held that a commercial newspaper cannot successfully be sued for libel if an editorial advertisement appearing in that publication is held to be libelous and the newspaper cannot be shown to have printed the advertisement with a malicious intent [*New York Times Co. I*]. That ruling would more than likely also apply to school newspapers. It must be emphasized that the *New York Times* rule applies only when public officials are discussed in the editorial advertisements. The recent *Gertz* decision indicates that such protection is not available if private individuals are libeled.

Only rarely does the question of selling student publications on campus arise, most students being content to distribute their messages free. Certainly, if a school wishes to sell the school-sponsored paper, it can give itself permission to do so. But can underground papers or other off-campus publications be sold on school grounds? As previously noted, commercial advertising is not given First Amendment protection, but courts have indicated that otherwise protected expression does not lose its protection simply because it is sold for profit [Thomas]. Courts differ on whether or not this applies to high school students.

In *Katz v. McAulay*, students distributed leaflets asking for contributions to the "Chicago Seven" defense fund. Solicitation was made before school and no evidence was presented of interference with school activities. Students were told to cease their activities because they were violating a district rule forbidding solicitations on school grounds. The Second Circuit admitted that the paper involved in *Scoville* was sold to students, but differentiated this case because the *Scoville* students were not punished under an anti-solicitation regulation. The court held that since students are required to attend school, making them a captive audience for solicitation of funds would be harmful to school operations. Considering the potentially large number of individuals and organizations which might attempt to solicit funds, the court said, the rule against such action focuses on a "demonstrable harm" and not an "undifferentiated fear" of disruption.

One judge in the *Katz* case filed a strong dissent, contending that solicitation of funds is a vital part of propagandizing when related to public issues and is thus protected by the First Amendment in the absence of disruption [at 1062; see *Cantwell, Murdoch*]. Similarly, in the *Jacobs* case, the Seventh Circuit held that the district's legitimate interest in keeping commercial activity out of the schools did not justify an anti-solicitation regulation that would adversely affect students' First Amendment rights. Previously, the District Court hearing the case had noted that a blanket prohibition on solicitations would prevent many fund-raising activities by student groups, such as mag-

azine sales and the often financially needed sale of the school-sponsored paper. The court felt that such a regulation was unnecessary, since the school's power to regulate the time, place, and manner of distribution was sufficient to maintain the "good order" seen threatened by allowing sales [at 608-609].

However, in *Cloak v. Cody*, a case later dismissed as moot, a District Court judge ruled that selling an underground paper on school grounds is commercial activity and therefore not protected by the First Amendment.

Litigation

Students may sue school administrators who interfere with their First Amendment rights, usually asking for reinstatement to school and expunging of punishment from their records.

The extent to which students and student publications currently are given First Amendment protection has evolved through a series of court cases in which students have sued school administrators or boards. Such action is increasingly common, but still happens in only a small fraction of instances involving confrontations between students and school officials. Students—and teachers—are usually too concerned with maintaining their current positions and not risking suspension or firing to begin litigation against their superiors. But as is evidenced by the number of cases cited herein, some students have found cause to file suits. Under what conditions may those suits be filed? Who may sue and who may be sued? What relief is asked in such suits?

While it was stated previously that school-sponsored and underground publications enjoy the same protections under the First Amendment, at least one law professor disagrees. C. Michael Abbott believes that if the school paper is considered part of the curriculum offered through journalism classes, administrators may have more control over it than over a non-sponsored publication [1:22-23]. He cites the Supreme Court's language in *Tinker*: "If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict . . . any-

where on school property, *except as part of a prescribed classroom exercise, . . .* the regulation would violate the constitutional rights of students . . ." [at 513, emphasis added]. However, one District Court has noted that after a school literary magazine was published—even though it utilized school funds and school facilities and was advised by an English teacher—it "had the character of a private creation by the student editors" [*Koppell* at 459].

The vast majority of cases involving student publications has been concerned with non-sponsored literature, and it is still not clear what additional control, if any, administrators may legally have over school-sponsored publications or to what extent advisers may legally control them. The *Zucker* case allowed student editors to publish an anti-Vietnam advertisement over the principal's objections, but this does not begin to answer all of the questions in this area.

The concept of a student editor suing the principal over a dispute involving content of the school paper seems almost incomprehensible to those who equate the campus situation with the commercial press. In fact, the analogy is not valid. Indeed, in commercial, profit-making publications, the owner-publisher has absolute authority, able to publish only what he wishes. No reporter for such a newspaper or magazine can successfully go to court and claim deprivation of his First Amendment rights because his superior refused to print a story. The owner-publisher is not clothed in state action. He is a private individual; in no way is he the government.

Public school principals, superintendents, and school board members, however, are very much clothed in state action. Their power is derived from state legislatures and, therefore, they cannot abridge individuals' First Amendment rights (a restriction imposed through the Fourteenth Amendment). Perhaps, then, school officials should not be thought of as "publishers" of school newspapers, yearbooks, and magazines. Surely they are the ones who would be sued if someone were to seek relief from an injury caused by a school publication—a libelous statement, invasion of privacy, and so on (although, as noted previously, it is difficult to sue a school district for such reasons and such suits are rarely filed). However, school officials do not "own" the publication. They may allocate monies to it, but they are tax monies, not their own funds. More to the point, they can no more arbitrarily violate students' First Amendment rights than can Congress or a state legislature. This has been demonstrated in numerous college cases [28] and in at least the *Zucker* and *Koppell* cases on the high school level. The question of who is the "publisher" of school-sponsored publications, then, may be an inapplicable one.

Students who do go to court are usually those who have been suspended or expelled for distributing publications. Individual adminis-

trators have been sued by name in about as many cases as have school boards as a group. In cases of a different nature, where sums of money in damages may be awarded, it is of considerable concern—and not yet certain—whether individual school officials or board members may be personally sued [30]. However, in suits involving student publications, courts have either allowed or rejected pleas to reinstate students and expunge notations of punishment from their records, but they have not yet granted damage awards.

Suits in this area, including the landmark *Tinker* case, are frequently brought to federal courts under section 1 of the Civil Rights Act of 1871:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [42 U.S.C.A. sec. 1983]

Although the Civil Rights Act was originally designed for racial problems, relief sought under the statute need not be only for wrongs inflicted because of race.

Action under the Civil Rights Act can only be brought in federal courts. There have been questions regarding exhaustion of remedies through the school administrative processes and state courts before federal action can be brought [*Egner*], but most courts have ruled that relief can initially be sought in federal District Court [*Sullivan I* at 1337; *Quarterman* at 56]. Students prefer to file in federal rather than state court because of the state courts' long-standing reluctance to overrule local school board decisions [9:174].

Students often file class action suits, attempting to make the court's ruling cover a broader sweep than just their particular situation. The *Fujishima*, *Quarterman*, *Sullivan (I)*, and *Zucker* cases, among others, were filed as class actions. If the suit is won, class action puts added pressure on administrators to change the rules under which students were punished, since the court would have indicated its decision would be applicable to more than just the case being heard. In one instance, school officials disputed whether students could file a class action suit because, they contended, the majority of students were not in sympathy with the suspended students' views. The court said this view was incorrect, in that it is not how many students might need to invoke First Amendment protection, but how many are subject to the unconstitutional regulation and are thus subject to deprivation of their constitutional rights [*Sullivan I* at 1337-1338].

Adviser's Role*

Courts have not definitively ruled on the extent to which advisers may be disciplined for what appears in school-sponsored publications. A pending case may shed more light on the area.

A case is currently pending in District Court in Los Angeles which may help clarify one cloudy area of student publications and the law—the adviser's involvement. Advisers, who are appointed by administrators to supervise school-sponsored publications, occasionally will allow the newspaper, yearbook, or magazine staff to print stories or pictures that do not meet standards established by school officials. Whatever the courts might decide in terms of the students' First Amendment rights to print such material, can the adviser be disciplined for allowing it to appear in a school-sponsored newspaper?

Two cases thus far have spoken to this point. *Jergeson v. Board of Trustees* supports the contention that high school faculty advisers are ultimately responsible for censoring school publications. Jergeson, a high school teacher in Wyoming, was faced with several charges, including incompetency. To support this, the school board cited an issue of the school newspaper, which Jergeson advised and which printed a picture of a row of urinals and a column, "Old Meany Master," critical of a school teacher. The board charged that Jergeson was responsible for the student newspaper staff and that his philosophy and practice of education were "detrimental to the best interests of the high school students" [at 482], although he claimed there were no specific rules or regulations regarding adviser responsibility for the paper.

The court cited the *Tinker* requirement that material and substantial interference with school operations must be shown, and contended that the school board could well have decided that the article in question did interfere with the rights of teachers and school administrators. While Jergeson said that the article and picture were published in the "spirit of fun," the court said that they were clearly barbed and were a "demonstration in poor journalism," since students were not "entertaining a . . . controversial matter of public nature but were making personal attacks on members of the faculty" [at 485].

As with *Jergeson*, *Calvin v. Rupp* may have involved more than the school newspaper. Although not certified to teach journalism, Calvin was responsible for school publications in a Missouri high school,

* Portions of this section were written by Marilyn Stine, graduate student in the School of Journalism, Southern Illinois University at Carbondale.

which included publishing a student paper. Problems arose when school officials objected to the heavy emphasis in one issue on a recently passed dress code. Later, Calvin indicated to administrators that he had knowledge of certain students using marijuana and alcohol and that some of this information would be published in the school paper. Administrators asked to see the issue before publication, but Calvin told students to discontinue working on that and all subsequent editions.

In refusing to renew his contract, school officials noted that Calvin had withheld for several months information about student misconduct which should have been reported to them, that he asked the Federal Narcotics Bureau to investigate student marijuana use without asking permission from or informing administrators, that he did not report to classes for a week, and that he failed to enter grades as instructed. Calvin, however, argued that his involvement with the teachers' union and refusal to accept censorship of the school paper were the key issues. The Eighth Circuit upheld his dismissal, noting that there was little administrative criticism of the school paper, that school officials declined to review before publication any issues except the one they requested, and that Calvin, not the administrators, had imposed censorship by telling students to cease working on newspaper production.

Since the grounds for Jergeson's and Calvin's dismissals included more than their actions as newspaper advisers, the question of adviser responsibility may be better clarified by *Nicholson v. Board of Education*, which is now awaiting jury trial in District Court. Nicholson was released from his position as English and journalism teacher in a Torrance, California, high school for refusing to submit articles to the school principal in advance of publication. The principal said he wished to apply to the articles the "Rotary 4-Way Test," a four-point ethics standard the International Rotary Club suggests for its members: (1) Is it the truth? (2) It is fair to all concerned? (3) Will it build good will and better relationships? (4) Will it be beneficial to all concerned? Among the articles Nicholson refused to submit for approval were those concerning Torrance's Chicano community, a student opinion survey on police-community relations, a movie review of "Midnight Cowboy," a play review of "Hair," and a headline implying that a school athletic coach had been dismissed [26].

While courts generally have upheld tightly written prior submission rules for public high school students, they have also considered standards similar to the "Rotary 4-Way Test" to be vague. And the adviser's responsibilities and liabilities in this area are not yet clear. The decision in the Nicholson case may help clarify these questions.

But the adviser is clearly caught in the middle. He is as much a school official as is the principal, being hired by the school board and

paid by taxpayers, and he can no more abridge students' First Amendment rights than can an administrator. However, the adviser's contract may stipulate that he must obey the school regulations, including those which may be repressive toward student publications, or that he cannot be insubordinate by disobeying a principal's orders to censor the school press. Conversely, there is the question of an adviser's academic freedom. Is he able to tell students not to print something if he sincerely believes that is the most effective method of teaching them proper journalistic practices?

The adviser's position, then, continues to be unclear. Students' freedoms became more solidified when students and parents began taking school officials to court. Advisers may also have to define their rights in court.

Conclusion

The purpose of surveying the current status of students' First Amendment rights regarding freedom of expression is not to show an erosion of the powers school officials legitimately require to properly operate their institutions and guide the education of their pupils or to encourage confrontations between students and administrators or teachers, but to emphasize that high school students are preparing for lives as useful citizens in a democracy and that experiencing or observing actions contrary to those deemed to comport with the Constitution can only undermine their positive views of society and instill an attitude of cynicism. Fairness, reasonableness, and equality are cornerstones of the democratic process and are elements which must guide administrative actions involving student publications, whether school-sponsored or not.

While there are admittedly differences of opinion regarding certain aspects of free expression for secondary students, application of the First Amendment to student publications has found general agreement on at least these points: (1) Students have the freedom to disseminate otherwise protected printed material on high school campuses unless administrators can prove material and substantial interference with the educational process due to such distribution or can properly predict disruption. (2) The burden is on administrators to prove disruption did or would have occurred. (3) Expression cannot be suppressed because of disagreement with or dislike for its content. (4) Administrators have no more, and perhaps less, control over student expression off school grounds and during non-school hours than on campus while school is in session. (5) School officials have a responsibility to curtail disruption caused by students opposed to the content of protected student expression, instead of suppressing the expression itself. (6) Provably obscene material is not afforded First Amendment protection and may be prohibited. (7) Student publications are subject to reasonable, nondiscriminatory regulation of time, place, and manner of dis-

tribution. (8) Administrators may prohibit student publications which incite violence or lawlessness. (9) Showing gross disrespect or disobedience toward school officials is likely to result in courts not reaching the constitutional question of free expression. However, in the absence of such disrespect, courts will uphold students' rights to express unpopular, even extreme, political views and comments critical of school administrators and policies. (10) Prior restraint of student-distributed material is permitted if such a regulation contains acceptable procedural guidelines.

This review of cases involving public high school students' freedom of press may be more helpful to those publishing underground papers than to students and advisers involved with school-sponsored publications. The reason is that most cases brought to court have involved underground newspapers and students who were punished for distributing them. It is not yet clear the extent to which school officials can control—even censor—school-sponsored newspapers, magazines, and yearbooks that are unquestionably used as "laboratory" instruments, that is, those which students clearly understand are utilized as teaching tools. The judge in the *Zucker* case would not accept the "laboratory" argument as allowing a principal to bar an editorial advertisement from the school paper, nor in the *Koppell* case would the judge allow a principal to stop distribution of a school-sponsored magazine because of alleged obscenity. But no court has yet definitively ruled on the constitutionality of an adviser censoring copy through prior restraint, by reading and passing on all material before publication (assuming students have no recourse to an acceptable appeals procedure). Conversely, it is not settled whether an adviser can be punished for *allowing* freedom of expression. Until the *Nicholson* case has been decided and all appeals exhausted, there will probably not be an answer to that question.

It is ironic, then, that students may have more freedom on underground papers than on school-sponsored publications. The situation has been precipitated by school officials too anxious to repress both types of newspapers. Perhaps more freedom for school-sponsored publications, produced under the watchful, non-censoring eye of an adviser, would be an acceptable compromise for both sides.

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78 Student Press Rights

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80 Student Press Rights

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82 Student Press Rights

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Explanations of Legal Citations

1. *Supreme Court of the United States*. Example: *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

After the case name comes the citation which enables locating the case in the correct volume within the correct series of volumes. In this instance, *Tinker* can be found in Vol. 393 of the United States Reports (U.S.) beginning on page 503. The Court's decision was handed down in 1969.

Cases too recent to be found in the official United States Reports may be cited as being in the Supreme Court Reporter (S.Ct.) or United States Law Week (L.W.). While these are published by unofficial, private companies, each contains the verbatim Court opinions.

2. *Courts of Appeals*. Example: *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973), *cert. denied*, 42 L.W. 3629 (1974).

Bazaar can be found in Vol. 476 of Federal Reporter, Second Series (F.2d.), beginning on page 570. It was decided in 1973 by the Fifth Circuit Court of Appeals (5th Cir.).

The case was appealed to the Supreme Court (the next highest court), which refused to grant *certiorari* (*cert. denied*), as reported in Vol. 42, page

3629, of United States Law Week (I.W.) in 1974. *Cert. granted* would indicate the Court had accepted the case for hearing. Other abbreviations could be *reh. granted* or *reh. denied*, meaning the Court had either granted or denied a petition for rehearing of the case, and *vacated*, meaning the Court had nullified the lower court's decision.

3. *United States District Courts.* Example: *Baker v. Downey City Board of Education*, 307 F.Supp. 517 (C.D. Calif. 1970).

Baker is reported in Vol. 307 of the Federal Supplement (F.Supp.) on page 517. It was decided in 1970 by the United States District Court for the Central District (C.D.) of California (Calif.). Abbreviations could also be N.D. for Northern District, W.D. for Western District, and so on. The letter D. indicates that there is a single district for the state.

Example: *Speake v. Grantham*, 317 F.Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971) (*per curiam*).

The District Court's decision in *Speake* was affirmed (*aff'd*) by the Fifth Circuit Court of Appeals in a ruling not signed by one judge as speaking for the court, but by the court as a whole (*per curiam*). A higher court may also reverse a lower court's decision (*rev'd*).

4. *State decisions.* Example: *Gott v. Berea College*, 161 S.W. 204 (Ky. 1913).

Gott is reported in a volume of the National Reporter System, published by a private company. In this instance, the case is found in Vol. 161 of the Southwestern Reporter (S.W.), beginning on page 204. The case was decided by the Kentucky Supreme Court (Ky.) in 1913. Other abbreviations may be N.W. for Northwestern Reporter, S. for Southern Reporter, and so on. All sections of the National Reporter System are now into a Second Series, merely a convenient way of numbering the volumes. For instance, P.2d means Pacific Reporter, Second Series. All these are state court decisions.

5. *Other abbreviations.*

F.R.D. is Federal Rules Decisions, a series not containing case decisions, but including such items as court orders.

L.Ed. is Lawyer's Edition, and A.L.R.Fed. is American Law Reports, Federal Series, both being series of volumes by a private publisher containing court opinions and annotations based on court decisions.